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REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON

DURING THE

**OCTOBER TERM, 1891, MARCH TERM, 1892, AND MAY
TERM, 1892.**

GEORGE H. BURNETT,
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JUSTICES
OF
THE SUPREME COURT

DURING THE TERM OF THIS REPORT.

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WILLIAM P. LORD, - - - - - ASSOCIATE JUSTICE
ROBERT S. BEAN, - - - - - ASSOCIATE JUSTICE

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OCTOBER TERM, 1891.

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

OREGON

OCTOBER TERM, 1891.

[Filed February 1, 1892.]

CHAS. H. DODD *v.* THE HOME MUTUAL INSURANCE COMPANY.

INSURANCE—SPECIFIC PERFORMANCE—RENEWAL OF POLICY—FAILURE OF PROOF.—A complaint which seeks to enforce specific performance of a parol agreement for the delivery of a new policy of insurance, to ascertain the plaintiff's loss thereunder, and decree a recovery of the amount thereof, is not supported by testimony tending to show a renewal of a former policy.

EQUITY JURISDICTION—FAILURE OF EQUITY—REMEDY AT LAW.—The rule that equity having assumed jurisdiction of a case for one purpose, will retain it for all purposes and administer complete relief, does not apply where there is a failure of proof of plaintiff's equity, but he will be remitted to such remedy as he may have at law.

ON REHEARING.

SUPPRESSION OF FACT—UNFAIR CONTRACT.—The suppression or failure to disclose a material fact, although through ignorance of the fact, or without intent to deceive, may render a contract so hard, or unequal, or unfair, that a court of equity will refuse to enforce the same against the party thus misled.

Multnomah county: L. B. STEARNS, Judge.

Defendant appeals. Reversed.

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Statement of the case.

After alleging that the plaintiff is doing business under the name of C. H. Dodd & Co., and the defendant is a corporation, the complaint proceeds: "That on the twenty-eighth day of May, 1889, the defendant issued to the plaintiff its policy of insurance, numbered 305,900, wherein and whereby it did insure the plaintiff against all direct loss or damage by fire to the amount of one thousand dollars upon his stock of merchandise, consisting principally of agricultural and other machinery, implements, vehicles, engines and boilers, threshers, horse-powers, headers, hay-presses, wind-mills, farm- and spring-wagons, buggies and carriages, attachments and extra parts to the above, belting, hardware, and machine supplies of all kinds, all while contained in the frame building known as Chas. H. Dodd & Co.'s warehouse, on the west side of Main street east of Grand street, Pullman, Washington Territory, now the state of Washington; that said policy by its terms expired on May 28, 1890, at noon; and before the expiration of the same, defendant agreed with plaintiff to renew said policy for the period of one year, to wit, from noon on the twenty-eighth day of May, 1890, to the twenty-eighth day of May, 1891, at noon, and to insure plaintiff against all direct loss or damage by fire for the term of one year from the twenty-eighth day of May, 1890, at noon, to the twenty-eighth day of May, 1891, at noon, to an amount not exceeding one thousand dollars, on plaintiff's stock of merchandise, consisting principally of agricultural and other machinery, implements, vehicles, engines and boilers, threshers, horse-powers, headers, hay-presses, wind-mills, farm- and spring-wagons, buggies and carriages, attachments and extra parts to the above, belting, hardware, and machine supplies of all kinds, all while contained in the frame building known as Chas. H. Dodd & Co.'s warehouse, on west side of Main street east of Grand street, Pullman, Washington Territory, now state of Washington, and to execute and deliver to plaintiff a policy of

Statement of the case.

insurance thereon in the usual form of policies issued by them, for the sum of one thousand dollars, for the term of one year, aforesaid, and the plaintiff agreed to pay the defendant therefor the sum of \$48.75, as premium, and to pay such premium on demand; that it was then agreed between plaintiff and defendant that said insurance should be binding on the defendant for the term of one year, commencing at noon on the twenty-eighth day of May, 1890, and ending on the twenty-eighth day of May, 1891; and defendant thereupon agreed with plaintiff to execute and deliver to him within a reasonable time a policy of insurance upon said property in the usual form of policies issued by said company, insuring said stock of goods in the sum of one thousand dollars against loss or damage by fire, and that plaintiff should pay as the premium therefor the sum of \$48.75, and pay the same on demand; that the defendant, by a policy of insurance in the usual form of policies issued by said company, among other things, did promise and agree with plaintiff to pay to plaintiff such loss and damage as he might sustain should the said property be destroyed or damaged by fire during said time, commencing May 28, 1890, and ending May 28, 1891, not exceeding one thousand dollars; that the property was destroyed by fire July 3, 1890; that plaintiff has been ready and willing at all times since said agreement was made, and still is ready and willing, to pay to defendant the sum of \$48.75, the premium agreed upon, whenever demand should be made for the same, and did, on July 19, 1890, duly tender and offer to pay said sum to the defendant, and demanded of the defendant that it issue a policy of insurance as agreed upon, but the defendant refused to accept or receive said sum of money so tendered, or to issue said policy of insurance as it promised, and still does refuse to accept or receive said premium, and to

- issue said policy of insurance, and plaintiff brings said sum of \$48.75, the premium agreed upon for such insur-

Statement of the case.

ance, into court, and tenders the same to defendant. The plaintiff has fulfilled all the conditions contained in the usual form of policies issued by defendant, and on July 19, 1890, and before the commencement of this action, and within the time required by such policy, made proof of his loss and demanded payment of said sum of one thousand dollars, but defendant has refused and still does refuse to adjust said loss, and refused and still does refuse to pay said sum or any part thereof; that plaintiff has no plain, speedy, or adequate remedy in a court of law, etc.

"Wherefore plaintiff prays that a specific performance of the agreement to insure plaintiff against loss or damage by fire to his property hereinbefore described, be decreed; that defendant be compelled to issue to the plaintiff a policy of insurance on his said property in the usual form of policies issued by it in the sum of one thousand dollars, for the term beginning May 28, 1890, and ending May 28, 1891; that defendant be compelled to adjust plaintiff's loss and damage by said fire, and that plaintiff have judgment against the defendant for one thousand dollars; and for such other relief as to a court of equity may seem meet in the premises," etc.

The defendant demurred to the complaint on the grounds—first, that the complaint does not state facts sufficient to constitute a cause of suit; and, second, that the plaintiff has a complete and adequate remedy at law upon the matters in said complaint alleged; which demurrer was argued and taken under advisement by the court; but the record fails to show that any disposition was made of the same. The defendant's answer admits the issuance of the policy, which expired on the twenty-eighth day of May, 1889, but each of the other allegations of the complaint is denied. Upon the trial the court below found the facts in accordance with plaintiff's allegations, and rendered the decree prayed for in the complaint, from which this appeal was taken.

Opinion of the court—STRAHAN, C. J.

Dolph, Bellinger, Mallory & Simon, for Appellant.

Cox, Teal & Minor, for Respondent.

STRAHAN, C. J.—There was some disagreement between counsel at the argument as to what the complaint contained; but that there should be no mistake on that point, the statement is made from the record and not from counsel's brief.

This is a suit in equity to enforce a parol agreement alleged to have been made between the plaintiff and the defendant for the delivery of a policy of insurance on the plaintiff's stock of merchandise, situated at Pullman, Washington, for one thousand dollars, and to ascertain plaintiff's loss thereunder, and for a decree for one thousand dollars. There are other allegations in the complaint; but its nature and object must determine its character. To obtain the specific performance of the alleged agreement, is the only foundation for the interposition of equity, and it therefore becomes necessary to examine whether or not the plaintiff has sustained, by a preponderance of the evidence, his allegations on that subject.

The plaintiff and his book-keeper are the only witnesses offered whose evidence is relied upon. The plaintiff testified in substance that Arthur Wilson was defendant's managing agent in Portland, and that he always came in before the insurance policies expired, and asked if they were to be renewed, and that plaintiff always renewed; never denied him at any time that witness could remember; remember a policy which had expired May 28th for one thousand dollars on the stock at Pullman; Mr. Wilson came to the store in the regular way and asked for a renewal of the insurance that the Home Mutual Company had with plaintiff, alleging at the same time that they had lost a small policy on us at Spokane, and we certainly ought not to go back, and asked that the policy be renewed. The policy was renewed at once, and plaintiff told him to renew all our insurance. He

Opinion of the court—STRAHAN, C. J.

further testified in effect that he placed no insurance at Pullman through any other person except Mr. Wilson, and that there had been no change in the rates, and the terms were for one year; that the Pullman policy was precisely the same kind of a one as the Walla Walla, and for three years the policy of the company has always been ordered in that way; that he had been in business twenty-five years, and had never given a written application; that the premium was payable sixty days after the insurance, and he had always been ready to pay it.

Witness continued: "July 3, I issued the order to the book-keeper to go through the insurance. We were very busy on other matters, and July 4th was next day after. We look up all insurance about that time, and go through the policies. We also received a telegram about half-past three, July 3d. I was upstairs in the type-writer office dictating, and the chief book-keeper brought up a telegram; also brought up the policies on the Pullman property, and brought the notice of the renewal that had been made in the Mutual, but did not remember the policy. I told him to see Arthur Wilson, as we only knew Arthur Wilson in this matter, and to tell him the policy had not been issued. He went to the office and returned and said Arthur Wilson was not there. I replied, 'We know nobody in this matter but Arthur Wilson; you find Arthur Wilson and bring back this policy indorsed by Arthur Wilson.' The renewal was made on the twenty-eighth of May. He brought it back exactly as ordered." He further testified that the renewal was for the same amount on the same subject matter at the same rate of premium, which amount was payable on the twenty-eighth of July. On his cross-examination, he says he did not advise the book-keeper to tell Arthur Wilson that the property had been destroyed by fire; that the former policy on the Pullman property was not issued through the company's agency at that place; that he kept an insurance book, but did not know whether it showed

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Downing's name opposite that policy or not, but did not think it did.

Mr. H. C. Johnson, the plaintiff's book-keeper, also testified in substance: "It is a part of my business to look after the insurance. I know Arthur Wilson, secretary of the Home Mutual Insurance Company. Remember Arthur Wilson being in the store two or three times, soliciting a renewal of insurance which he had. I heard him ask Mr. Dodd for a renewal of insurance, and Mr. Dodd told him he could renew it. I can trace back the record of insurance with the Home Mutual for three years. The business was done with Mr. Wilson. I recollect the policy for one thousand dollars expiring May 28, 1890. I understood it was one of the policies to be renewed. I was looking over the policies in June, the general practice, when I found we were short two policies, one in Laidlaw's company and one in the Home Mutual Company; and I started out to look it up and see why it had not been brought here. I went to Laidlaw's office—for some reason did not go to Wilson's; that slipped my mind. The next time that policy came into my mind, or the fact of its not being renewed, was on the afternoon of July 3d. We had a telegram that there had been a fire at Pullman, and I started to look up all insurance, and found we were short this policy, and called Mr. Dodd's attention to it, and he told me to go and ask the company if they would cover that thousand dollars. I went to the office of the company, and did not see Mr. Wilson there. I saw another gentleman I took to be Mr. Bush. He seemed to be in authority, and instructed the book-keeper to make the policy. I had two policies with me and asked him if those policies—in conversation—if they were covered in the policy. I had the Walla Walla policy. He asked me if I could not find the policy. I told him no; not for Pullman. He said, 'all right, you are covered,' and instructed the clerk; 'you are covered.' (Witness here recognized the endorsement then

made by the clerk on the policy.) He wrote on the policy 'covered,' and signed his surname, 'Moffett.' I brought the policy back and told Mr. Dodd. He said he knew Mr. Wilson better than anybody else in the matter, and told me to find Mr. Wilson, if I could, and ask him if our policy was covered, and get the endorsement. I looked in the directory and found where Mr. Wilson boarded, and went to his boarding-house about six o'clock and inquired for him, and they said go to his room, and I showed him the policy. When told we had no new policy in place of that, he said he didn't know how that occurred. I asked him if we were covered, and he said we were covered. I asked him to mark it on the policy, and he did so. This is what Wilson wrote on the policy: 'It is understood this policy is in force from May 28, 1890, for one year Arthur Wilson.' Mr. Wilson had no objections to writing this on the policy; he seemed anxious to say the policy was in force, and would make it in force as far as he could."

On his cross-examination, this witness testified among other things in effect: "I did not say anything to the gentlemen in the office about the fire. I kept that a secret from them, and went back to Mr. Dodd, who said he knew Count Wilson, and knew his authority, and wanted me to go and get the endorsement of Count Wilson. I did not mention to Mr. Wilson about the fire when I saw him at his room."

Mr. Wilson testified that he was secretary of the defendant company in the month of May, 1890.

The defendant called Mr. Moffett and Arthur Wilson, who contradicted much of what was testified to by the plaintiff and Johnson, except as to the calls made at the office and at Mr. Wilson's private room by Mr. Johnson, and as to these their version is not at all favorable to the plaintiff.

The evidence offered on the part of the plaintiff tends to a limited extent to prove that there was a verbal agree-

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ment between the plaintiff and the defendant for the renewal of policy 305,900 for one thousand dollars, on the plaintiff's stock of merchandise at Pullman, which was to expire by its terms on the twenty-eighth of May, 1890, and not for a new policy to be issued on that property; also that the policy was renewed by the endorsements. The renewal of a policy is quite another and distinct thing from the issuance of a new policy.

Says Wood on Fire Insurance, § 139: "When a policy of insurance is renewed, the renewal stands upon the same ground as the original policy and subject to the same defenses. Not only is the policy, but all the elements upon which it was predicated are continued in force, and it is treated as having been upon the same grounds, representations, and considerations that dictated the issue of the policy; and if any change is agreed upon or intended, it must be expressed in the renewal, or it cannot be relied upon without a reformation of the receipt, as a renewal receipt is a contract and receipt, and is only open to parol proof except so far as it fills the office of a receipt." And in the same section the author continues: "A policy of insurance may be continued in force by a subsequent contract made before, at the time of or after the policy had expired. Such a continuance in force of a policy differs from a new contract of insurance, as by it the original contract is kept up; and in case of loss, the original policy is the basis of action in connection with the contract of renewal or continuance."

All that Johnson did under plaintiff's directions in calling at the defendant's office and upon its secretary at his private rooms, was to obtain some recognition or acknowledgment that the old policy was continued in force and not a recognition of a previous or present agreement to issue a new policy. In that view of this record, and the evidence in support of the plaintiff's allegations, the plaintiff has wholly failed to satisfy us by a preponderance of the evi-

dence that the defendant undertook or promised to issue and deliver a policy on the Pullman property; and this alleged agreement being the sole ground of the plaintiff's equity, the suit must fail in its main purpose for that reason.

But the plaintiff contends that having proceeded thus far with this inquiry, and having reached a conclusion adverse to him on the equitable aspects of his case, we ought to retain the case and determine the questions of fact upon which the defendant's legal liability may be supposed to depend. There is a numerous class of cases where, if equity takes jurisdiction for one purpose, it will retain the cause for all purposes and administer complete relief; but having found against the plaintiff's equity, that rule has no application. If we had found that the defendant agreed to issue the policy, and had refused, we might have decreed specific performance, and then we could, as incident to the equitable relief to which the plaintiff would have been entitled, have ascertained the amount of plaintiff's loss and decreed that defendant pay the same. (*Phoenix Ins. Co. v. Ryland*, 69 Md. 437.) But where the equity entirely fails, we think it better to dismiss the suit and leave the party to pursue such legal remedy as he may be advised.

We do not determine whether there was a renewal or not, nor the effect of the endorsements on the old policy. These are all questions of fact, which belong properly to the legal forum, and we cannot voluntarily assume to decide them. Besides, the machinery of a court of law is better adapted to their determination than that of a court of equity.

It follows that the decree appealed from must be reversed, and the suit dismissed without prejudice as to any legal rights that may be involved in the record.

[Filed February 22, 1892.]

ON REHEARING.

STRAHAN, C. J.—Counsel for the respondent have presented a petition for a rehearing, mainly on the ground that the court mistook the term “renewal,” used so frequently in the evidence, and that we should have held that the parties meant by the use of that term the issuance of a new policy and not the continuing of the old policy in force. It is true that in some parts of the plaintiff’s evidence something was said about a new policy, but the great body of the evidence refers entirely to a renewal. In addition to this, the sending of the book-keeper to the office of the defendant company and to the private residence of the secretary of the company with the old policy with directions to procure the endorsements on the policy showing the renewal, we think indicate what was the plaintiff’s intention and understanding too clearly and conclusively to admit of any controversy. This much may be said conceding the plaintiff’s entire sincerity in the transaction; but if we are compelled to rely upon that transaction or any part of it as a basis for equitable relief, the same cannot receive the approval of the court. The plaintiff through his book-keeper sought to secure a renewal of the old policy or evidence on that subject by concealing the material fact then within his knowledge: that the property at Pullman had been destroyed by fire on that day; and it was because of that knowledge that he would tolerate no delay; Arthur Wilson must be found, and the endorsement must be procured before the company could probably learn of the fire. Was there any reason for this concealment and silence other than an intent thereby to overreach the defendant? In such case the plaintiff may be exonerated of all fraudulent intent, and in this class of cases the result would be the same. The suppression of a material fact, or the failure to communicate a material fact without any purpose of de-

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ceiving or misleading the other party, and even without having himself any knowledge of the fact, while not affecting the validity of the agreement at law, and not being sufficient ground in equity for its cancellation because not fraudulent, may still render the agreement so unfair, unequal, or hard that a court of equity, in accordance with its settled principles in administering the remedy of specific performance, will refuse to enforce the contract against the party who was misled. (2 Pom. Eq. Jur. § 905.)

We have carefully reexamined the grounds upon which the opinion in this case proceeded, as well as the evidence, and we are entirely satisfied, in whatever light the same may be viewed, that the plaintiff is not entitled to the relief which he seeks.

The petition for a rehearing must therefore be denied.

[Filed February 1, 1892.]

LEE GOODMAN v. O. R. & N. CO.

EVIDENCE—OFFER OF WRITING IN TESTIMONY.—Where it does not appear that a writing has been altered by some unauthorized person, a party offering it in evidence will not be permitted to select that part of it favorable to his case and exclude another part which might operate unfavorably.

CARRIERS—INHERENT DEFECTS OF GOODS.—In the absence of negligence on their part, carriers are not liable for losses arising from the inherent qualities of the goods they transport, or from their ordinary wear and tear in the course of carriage, or from the insecure or imperfect manner in which they are packed by the owner.

Multnomah county: E. D. SHATTUCK, Judge.

Defendant appeals. Reversed.

This action is founded upon two counts for damages to two lots of goods alleged to have been shipped over the defendant's line, one lot marked "S. W. Miller," and another lot marked "H. D.," the value of the S. W. Miller lot being charged at one thousand four hundred and eight dollars and twenty-nine cents, and that of the H. D. lot as of the

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value of two thousand one hundred and twenty-five dollars and twenty-eight cents, the value being the alleged value at Portland, Oregon. The goods consisted of a variety of drugs and medicines, principally in bottles, some in barrels, consisting of oils, whiskies, etc.

It was charged in the complaint that in August, 1888, plaintiff delivered to the defendant company as a carrier at Huntington, Oregon, this merchandise, which it was charged the defendant received at Huntington, and agreed to safely transport to Portland, Oregon, and there deliver to the plaintiff within a reasonable time. The complaint then charged that the defendant did not safely carry or deliver the goods, but on the contrary, by negligence and misconduct of the defendant, "the same were in great part wholly lost and destroyed, and in great part so destroyed, damaged, and injured as to be wholly worthless and of no value, and as to the rest and remainder of the same so damaged and injured as to be rendered nearly worthless, and plaintiff was compelled to and did sell the rest and remainder for the sum of three hundred and eighty-seven dollars and seventy cents, which was and is a reasonable value therefor on account of the said damage and injury, and that all of said merchandise marked S. W. Miller was lost or so destroyed, damaged and injured as to be nearly worthless and of no value, when the same arrived in Portland, Oregon, and on account of the worthlessness of the same, plaintiff refused to receive the S. W. Miller goods on arrival at Portland, Oregon." The material allegations of the complaint were denied by the answer.

The evidence at the trial tended to show that in July, 1888, the plaintiff shipped from Kahoka, Missouri, over the Keokuk & Western Railway, two separate lots of goods by separate shipments and with separate bills of lading therefor, of the general nature and character of goods in the complaint mentioned; one lot being billed to Hugh Doak at Granger, Wyoming, for delivery there, and

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another lot billed to S. W. Miller at Ogden, Utah, for delivery there. The evidence tended to prove that the goods were carried by rail by different railway companies from Kahoka, Missouri, and finally reached their respective destinations at Granger and Ogden, respectively; that in the course of this carriage, they were carried from Kansas City, Missouri, to destination by the Union Pacific Railway Company. The evidence of the plaintiff further tended to show that he followed the goods and saw them boxed in the warehouses at Ogden and at Granger, Wyoming.

The bills of lading, which he received from the Keokuk & Western Railway Company, were as follows: "Received from Dr. Lee Goodman the following described packages, in apparent good order, contents and value unknown, consigned as marked and numbered on the margin, to be transported over the line of this road (the Keokuk & Western Railroad) to the company's freight station at its terminus, and delivered in like good order to the consignee or owner at said station, or to such company or carriers, if the same were to be forwarded beyond said station, whose line may be considered a part of the road, to the place of destination of said goods or packages; it being distinctly understood that the responsibility of this company as a common carrier shall cease at the station where delivered to such person or carrier; provided no carrier or company forming a part of the line over which such freight is to be transported will be responsible for demurrage or detention at its terminus or beyond on any part of the line arising from any accumulation or over-pressure of business, upon the following conditions: Freight carried by this company must be removed from the station during business hours upon the day of its arrival, or it will be stored at the owner's risk and expense. In the event of its destruction or damage from any cause while in the depot of the company, it is agreed that the company shall not be liable to pay any damages therefor. It is agreed, and is a part of the con-

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sideration of this contract, that the company will not be responsible for the leakage of liquids, breakage of glass or queensware, * * * nor for damages arising to any article carried, from the effects of heat or cold. The company will not be responsible for damages on tobacco unless it is proved to have occurred during the time of its transit over this road; and of this, notice must be given within thirty hours after the arrival of the same. The responsibility of this company as a carrier to terminate on the delivery of freight as per this bill of lading to the company whose line may be considered as a part of the route to the place of destination of said goods or packages. In the event of the loss of any property for which the carriers may be responsible under this bill of lading, the value or cost of the same at the time and point of destination is to govern in the settlement for the same." Then followed a description of the goods and packages embraced in the bills of lading, one lot being marked as destined to Granger, Wyoming, to Hugh Doak as consignee, and the other lot being marked as destined to Ogden, Utah, for delivery to S. W. Miller, as consignee.

The evidence tended to show likewise that after the arrival of these several lots of goods at Granger and Ogden, they were forwarded to Portland, Oregon, by the direction of the consignor, Goodman, the Granger shipment being carried over the Oregon Short Line road to Huntington; the Miller shipment over the Utah & Northern road from Ogden to Pocatello, and thence over the Short Line road to Huntington. At Huntington both lots were received and carried in the ordinary course of business over the defendant's line of road from Huntington to Portland.

There was no evidence whatever tending to prove the condition of the goods when they arrived at Huntington. The goods were shipped from Wyoming, without any bills of lading issued therefor. On the back of the bills of

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lading issued by the Keokuk & Western road at Kahoka, Missouri, the following endorsement appeared: "Please have the goods covered by this bill of lading forwarded to Portland," signed H. Doak and Dr. Lee Goodman as to the Granger shipment, and signed S. W. Miller and Dr. Lee Goodman as to the Ogden shipment. The evidence tended to show that the plaintiff had signed all these names. The plaintiff admitted having given directions to the station agents at Granger and Ogden to forward these goods from those places respectively to Portland, Oregon, and that he wrote the following letter on the train:

"GREEN RIVER, Wy., August 1, 1888.

"*R. R. Freight Agent, Ogden, Utah*—DEAR SIR: You will please forward the following goods to Portland, Oregon: 10 boxes drugs, 7 boxes sundries, 2 boxes liniment, via McCamman, Oregon Short Line, to Portland; shipped by Dr. Lee Goodman, Kahoka, Mo., to S. Miller, Ogden, Utah, on July 28, 1888. If the goods are not at your depot yet, please wire me at Portland on receipt of this.

"And oblige, respectfully,

"S. W. MILLER.

"P. S.—Let freight charges follow goods, etc.

"P. S.—You can authorize agent at Portland, Oregon, to take up the bill of lading or freight bill I hold on delivery of goods at Portland, and send same to you at Ogden, etc. Need not have goods uncased, if you can prevent it, at your station, and just forward as directed within this letter."

Plaintiff admitted upon the trial that he wrote this letter and signed Miller's name to it while on the train coming west. The condition of the goods at Huntington was unknown. No bills of lading were issued at Ogden or Granger when the goods were forwarded from those points. The goods arrived in Portland in bad condition, more or less damaged and injured. The plaintiff offered in evidence the way-bills which had been issued by the Union

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Pacific Railway Company at Granger and at Ogden, and which accompanied the goods to Portland. These way-bills were admitted with the exception of a certain sentence written in pencil, which was excluded. From these way-bills it appeared that the Hugh Doak shipment of goods when forwarded from Granger, Wyoming, were in bad order and condition—barrels leaking, boxes of glassware rattling, and boxes stained. On the way-bill of the Ogden shipment, issued when the S. W. Miller lot was forwarded from Ogden, there was a notation in lead pencil opposite the stamp mark of the railway office at Pocatello, Idaho (but whether made there or elsewhere did not appear), as follows: "All this shipment badly broken up; all boxes broken; cans spilled and injured; repacked here into 15 boxes; weight, 1,810." This pencil notation on the way-bill was excluded from evidence, as stated heretofore, though the way-bill and its contents, except this pencil notation, was admitted by the court, it having been put in evidence by the plaintiff, having been produced by the defendant on notice from the plaintiff therefor. An exception was taken to the exclusion of the pencil notation on the way-bill, and subsequently and in the course of the trial the defendant itself offered the pencil notation, the plaintiff having offered the way-bill itself, and the court again excluded the pencil notation, and an exception was reserved.

The evidence further tended to show also that the goods at Granger, Wyoming, were in bad condition. The station agent who received them there and the conductor of the freight train that hauled them there were both sworn and testified as to their bad condition—the barrels leaking and the boxes rattling and stained; and the railway agent testified that it was because of this condition that the goods were way-billed out of Granger by the railway company as in bad order and condition, as shown by the way-bill. It having been made to appear that the goods were originally

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shipped from Kahoka, Missouri, the defendant identified a certain expense bill, rendered by the Keokuk & Western Railway Company to the Union Pacific Railway Company at Kansas City, and the same was offered in evidence, and excluded by the court, and an exception taken. On the face of this expense bill it appeared that the goods referred to were described as being rough barrels leaking at the bungs, and boxes stained.

The evidence tended to show that it was the course of business among railways, and among others the Union Pacific, to issue way-bills for all goods received for carriage, whether from shippers or from connecting lines, which way-bills accompanied the shipments and were carried with the goods, and upon which way-bills it was usual to note the character, quality, and condition of the goods as far as the same was observable from external appearances.

The evidence tended to show also that with reference to the particular case in question, the Union Pacific Railway Company had issued way-bills to accompany the shipment of goods from Kansas City, one way-bill for the Doak shipment to Granger, Wyoming, and one for the Miller shipment to Ogden, Utah. These way-bills having been identified as issued in the ordinary course of business and accompanying these shipments from Kansas City to Granger, and from Kansas City to Ogden, they were offered in evidence by the defendant, but were rejected by the court, and exceptions were reserved. From these way-bills it appeared that the goods were way-billed out of Kansas City as in bad order and condition, namely, barrels leaking, boxes stained, and glass rattling in boxes. Exceptions to the refusal to receive these way-bills in evidence were reserved.

There was no evidence in the case that any of the goods were injured from negligence or otherwise after the goods arrived at Huntington and between that point and Portland, Oregon, nor was there any evidence that they were

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in good condition or well packed or boxed at Huntington, and the bill of exceptions so certifies.

The jury returned a general verdict for the plaintiff for one thousand five hundred dollars, and at the same time returned answers to certain questions submitted to them by the court as follows: "First—Were the goods and merchandise in the complaint mentioned received at Huntington, Oregon, for carriage to Portland? A.—Yes. Second—If the jury answer yes to the foregoing question, then were these goods and merchandise originally shipped from some town in the state of Missouri in July, 1888, consigned one lot to Ogden, Utah, and one lot to Granger, Wyoming? A.—Yes. Third—If the jury answer yes to the last question, then were these goods thereafter and before being taken by the consignee, directed to be forwarded from Granger and Ogden to Portland, and were they carried through from the town in Missouri to Portland by rail? A.—We believe they were. Fourth—Were the goods and merchandise in the complaint mentioned, in July and August, 1888, and before being received at Granger, carried by other railroads east of Huntington and other than the Oregon Railway & Navigation Company road? A.—We believe they were. Fifth—Of the goods and merchandise in the complaint mentioned, was there a shipment comprising part of the same arriving at Granger, Wyoming, before being forwarded from that point to Portland, Oregon; and if so, were these goods and merchandise in good order and condition at Granger, Wyoming, or were they broken and in bad order and condition at that point, and were they in that condition when arriving at Huntington? A.—Slightly leaking and rattling. Sixth—Of the goods and merchandise in the complaint mentioned, was there a shipment comprising part of the same which originally went to Ogden, Utah, before being forwarded to Portland, Oregon, and was this shipment in good order and condition at Huntington, Oregon, and reasonably well packed and

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boxed before being there received for carriage and carried to Portland? A.—We believe they were. Seventh—If the jury find that the plaintiff is entitled to recover, then state how much of the damages which the jury may find is assessed for injury or damage to that lot of goods originally shipped to and arriving at Granger, Wyoming, and how much of it to that lot originally shipped to and arriving at Ogden, Utah? A.—Miller lot, five hundred and seventy-one dollars and forty cents; H. D. lot, twenty-four dollars and fifty cents.” The foregoing questions were submitted at the suggestion of the defendant; the following at the request of the plaintiff: “Were the goods in the complaint mentioned ordered to Portland from Ogden, Utah, and Granger, Wyoming, respectively, by defendant, and were they carried and brought forward on such order? A.—They were.”

The court gave judgment on the verdict for the plaintiff, from which the defendant appeals. The exceptions to the rulings of the court in giving and refusing instructions, so far as may be necessary to the proper disposition of the cause, will be noticed in the opinion.

W. W. Cotton, and Gilbert & Snow, for Appellant.

Generally speaking, and in the absence of an agreement between a carrier and a shipper, where goods are received for carriage destined beyond the line of the carrier, the shipment becomes local as to the initial carrier, whose liability ceases on delivery to the connecting carrier. (*Lawson's Contracts Carriers*, §§ 234, 240; *R. R. Co. v. Mfg. Co.* 16 Wall. 324; *R. R. Co. v. Pratt*, 22 Wall. 129; *Root v. G. W. Ry.* 45 N. Y. 524; *Reed v. U. S. Ex. Co.* 48 N. Y. 462; 8 Am. Rep. 561; *Burroughs v. Norwich R. R. Co.* 100 Mass. 26; 1 Am. Rep. 78; *Rauson v. Holland*, 59 N. Y. 611; 17 Am. Rep. 394.)

Merely receiving goods marked or receipted for as destined beyond the line of the initial carrier does not make it a through shipment. It is still, as to it, a local shipment, with an

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agency for the shipper to forward by connecting lines. (*Root v. G. W. Railway*, 45 N. Y. 524; *Van Santvoord v. St. John*, 6 Hill, 157.)

The declaration of the initial carrier in the expense bill, offered in evidence and rejected, as to the condition of the goods when delivered to the Union Pacific Railway at Kansas City, were admissible as the declaration of the principal, Goodman. So also were they admissible as a part of the *res gestæ*, for, occurring at the time of the delivery for further carriage, they were explanatory of the act of delivery. (1 Green. Ev. §§ 108, 113; *Gilliam v. Sigman*, 29 Cal. 641; *Huntingdon & B. T. R. v. Decker*, 82 Pa. St. 123; *Wheeler v. Hambright*, 9 S. & R. 390.)

A carrier is not liable for injuries to goods arising from improper packing and boxing. (Lawson's Contracts Carriers, § 22; *Angel Carriers*, § 12; *Klauber v. American Express Co.* 21 Wis. 21; 91 Am. Dec. 452; *The Col. Ledyard*, 1 Sprague, 530.)

A part of a writing or conversation put in evidence entitles the whole to be received. (Hill's Code, § 690; *Rice v. Cunningham*, 29 Cal. 492; *Gilliam v. Sigman*, 29 Cal. 641; *Lawrence v. Fulton*, 19 Cal. 689; *Rounse v. Whited*, 25 N. Y. 170; S. C. 85 Am. Dec. 337; note 342.)

U. S. Grant Marquam, and *X. N. Steeves*, for Respondent.

If the goods in the complaint mentioned were in a certain condition when they were shipped at Granger and Ogden, and they came over connecting lines from said places to Portland, Oregon, and at Portland, Oregon, they were found in a much worse condition than at Granger and Ogden, the law presumes the loss or damage occurred on the last line, and the last line or appellant is liable unless it can show when and where the loss occurred. (*Laughlin v. Chicago etc. R. R. Co.* 28 Wis. 204; 9 Am. Rep. 493; *Schouler Bailm.* 526; *Leo v. St. Paul M. & R. Co.* 30 Minn. 438; *Smith v. N. Y. Central R. Co.* 43 Barb. 225; *Tarbox v. Eastern Steamboat Co.* 50 Me. 339; *Shriver v. Sioux City etc. R. Co.* 24 Minn. 506; 31 Am. Rep.

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353; 2 Thompson Trials, § 1861; *Mobile & O. R. Co. v. Tupelo Furniture Co.* 67 Miss. 35; 19 Am. St. Rep. 262; Lawson Presumptive Evidence, 166, 171.)

Notations on the way-bills, even if the appellant would show when, where, by whom, and under what circumstances they were made, would not be admissible. (*Julius King Optical Co. v. Treat*, 72 Mich. 599; *Hoffman Chicago etc. R. R. Co.* 40 Mich. 60; *Bronson v. Leach*, 74 Mich. 713.)

A written memorandum of a fact made by one who, upon being called as a witness testifies to the fact, is not competent evidence of such fact. (*Nat. Bank of Commerce v. Meuder*, 40 Minn. 325.)

If the goods were in such condition as appellant claims they were, it should have refused to receive them as it would have a right to do. (2 Am. & Eng. Enc. Law, 787; *Union Express Co. v. Graham*, 26 Ohio St. 595.)

If a carrier accept goods defectively packed where the defect is apparent, he is liable if the goods are further damaged while in his custody. (2 Am. & Eng. Enc. Law, 854; Schouler Bail. 416; *Shriver v. Sioux Oy. R. R. Co.* 24 Minn. 506; 31 Am. Rep. 353; *Higginbotham v. Great Northern Ry. Co.* 10 Weekly Rep. 358; *Spring v. Haskell*, 4 Allen, 112; *McGregor v. Kilgore*, 6 Ohio, 363; 27 Am. Dec. 260; 2 Sedgwick Meas. Dam. § 94.)

STRAHAN, C. J.—The plaintiff by his pleadings seeks to confine the inquiry in this case to the shipment from Huntington to Portland; but during the progress of the trial both sides found it necessary to inquire somewhat into the condition of the goods prior to their arrival at Huntington. The object of this inquiry on the part of the defendant was to furnish the jury some facts by which they might be able to determine the condition of the goods when they were received by the defendant company. As the case went to jury, there was neither allegation nor proof as to whether these goods were in a proper condition for shipment at the time the defendant received them.

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The first ruling of the court to which our attention will be directed is the exclusion from the consideration of the jury of the part of the way-bill above referred to written in pencil. The way-bills were issued by the Union Pacific Railway Company at Granger and at Ogden, respectively, and on their face they tended to show that these goods were not in proper condition for shipment when they were started forward from those points by order of the plaintiff. The way-bill issued at Granger tended to show that the Hugh Doak shipment to that point was in bad order and condition—barrels leaking, boxes of glassware rattling, and boxes stained; and the agent at Granger testified that the shipment from that point was way-billed as being in bad order. It was stated in pencil on the face of the way-bill, which accompanied the Miller shipment from Ogden: "All this shipment badly broken up; all boxes broken; cans spilled and injured; repacked here into 15 boxes; weight, 1,810." The court admitted the way-bills except those parts tending to show the condition of the goods. These were excluded. Those parts were then offered by the defendant and again excluded.

Upon the trial here counsel for the appellant urged that these portions of the way-bills were a part of the *res gestæ*, and admissible as a part of the transaction of the shipment. Whether they are a part of the *res gestæ* seems unnecessary for us to determine for the reason we think they were admissible on another ground. The plaintiff introduced the way-bills in evidence, and he could not be permitted to select that part which was favorable to his side of the case, and exclude a part of the same paper which might operate unfavorably. Of course, if it appeared that the part of the way-bill to which the plaintiff objected had been surreptitiously written by some unauthorized person, it could not affect the rights of the parties; but simply finding it in pencil is not enough; for aught that appears it was written at the same time that the other

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parts of the bill were written; and the plaintiff having made the way-bill evidence by offering a part of it, the defendant had the right to have the entire paper submitted to the jury for whatever they might think it was worth, and its exclusion by the court was error.

There was no evidence in the cause that any of the goods were injured while being transported from Huntington to Portland, nor did it appear from the evidence that they were in good condition or well packed or boxed at the time the defendant received the same from the Oregon Short Line. On this point the defendant's counsel asked the court to instruct the jury: "First—There is no evidence in the cause that any of the goods in the complaint mentioned were damaged or injured while the goods were in transit between Huntington and Portland, or after having been received at Huntington for carriage. Second—There is no evidence in the cause that the goods in the complaint mentioned were damaged or injured through any carelessness, negligence or misconduct of the defendant, its servants or employés." These instructions covered several allegations made by the plaintiff, and upon which he apparently based his right to recover, in part at least; and having failed to produce any evidence whatever tending to prove them, it was the right of the defendant to have the court tell the jury directly that the plaintiff was without evidence on these parts. Such instructions would have eliminated that much of the plaintiff's contention from the case, thus narrowing the controversy down to the precise and definite point upon which it must turn.

The defendant also asked the court to instruct the jury as follows: "As between shipper and carrier of goods, it is incumbent upon the shipper to so reasonably and securely pack the same that they would not be injured from the ordinary and usual incidents attendant upon a shipment of the same from one point to another, and if the goods be in their nature perishable or encased in glass

so as to be susceptible of easy breakage, greater care is required of the shipper in the matter of packing and boxing to prevent breakage. A carrier is not liable for injury or damage to goods arising from insecure or imperfect packing or boxing; and if in this case the jury believe that the goods in the complaint mentioned were so imperfectly packed or boxed, and that thereby and by the ordinary incidents arising from transportation of such goods the damage and injury complained of arose, the verdict should be for the defendant."

The general rule on the subject of the liability of common carriers of goods is said to be that they are liable for all losses excepting those caused by the act of God or the public enemy, but this definition is said to be misleading. "More correctly it may be said that the carrier is not liable: (1) For losses caused by the act of God; (2) losses caused by the public enemy; (3) losses caused by the inherent defect, quality, or vice of the thing carried; (4) losses caused by the seizure of goods or chattels in his hands under legal process; (5) losses caused by some act or omission of the owner of the goods." (Lawson Carriers, 5, 6.) And further on, the same author states the principle more fully. He says: "Carriers are not liable for losses arising from the ordinary wear and tear of goods in the course of transportation, nor for their ordinary deterioration in quantity or quality, nor for their inherent natural infirmity or tendency to damage; and this rule includes the decay of fruits, the diminution, leakage, or evaporation of liquids, and the spontaneous combustion of goods. In all such cases, where the negligence of the carrier does not coöperate in the loss, he will be excused. This exception also includes all injuries done by living animals to themselves and to each other; losses that are caused by their inherent vices and propensities and which excuse the carrier if his negligence does not concur in causing them." (Lawson Carriers, 15, 16.) And the same principles are stated in 2 Am. & Eng. Ency. Law,

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853, and abundantly supported by an array of authorities not to be questioned. The instruction asked substantially covered this view of the carrier's responsibility and should have been given.

The ninth instruction asked by the defendant embodied a correct principle of law, and should have been given. The instruction is as follows: "Ninth—If the jury believe from the evidence that the goods in the complaint mentioned were received at Huntington by the defendant for carriage to Portland, that they were carried by the defendant and arrived in Portland in the condition in which they were received, the verdict should be for the defendant." But the failure to give this instruction would not of itself be sufficient to reverse the judgment for the reason the court gave it substantially in its general charge. But in addition to this, the court told the jury among other things that "the history of the transit from Granger and Ogden to Huntington, may or may not have been presented by this testimony, but the goods ought to be presumed by you to be in no worse condition at Huntington than they were at Granger and Ogden. They could hardly be presumed to be in any better condition, but they ought not to be presumed in any worse condition than they were at Granger and Ogden." Under the particular facts of this case, it seems to us this instruction was inapplicable and did not declare the correct rule of law.

There was some evidence before the jury tending to prove that at one of the points east of Huntington the barrels were leaking at the bungs, glass rattling in the boxes, and the boxes were stained. These facts would clearly indicate that the goods were not in a safe or proper condition for transportation at that time; and it was a question of fact for the jury to find from the evidence what the condition of the goods was when the defendant received them, and whether or not their further transportation in that condition did reduce them to a worse condition than when

Points decided.

they were received. It was not a case, then, where any presumption could be invoked, but a question of fact to be found solely upon evidence. *The Missouri Pac. R. R. Co. v. Breeding*, 16 S. W. Rep. 184, is authority on this point. In that case, the court having this question under consideration, said: "Negligence or a failure to perform a duty required by law is never presumed as a fact, but must be proved by evidence; and the burden of proving it is on the party seeking a recovery of damages by reason of such negligence or failure of duty. The machine was second-hand, and the plaintiff introduced no evidence showing that it was in good condition or what was its condition when received by the company for shipment."

Some other questions were presented at the argument, but we have not deemed their consideration necessary to a proper disposition of this case; but for the errors already referred to, the judgment must be reversed and a new trial awarded.

[Filed February 22, 1892.]

JOHN PEARCE ET AL. v. T. C. BUELL ET AL.

92	90
127	918
23	29
134	77
34	78
22	29
35	75

FRAUD — ALLEGATA AND PROBATA — FAILURE OF PROOF.—Where a party seeks relief on the ground of fraud perpetrated by another, he must not only allege, but must also prove, that he relied upon, and was innocently, on his part, misled by the fraudulent statements of the other party; and unless the evidence shows this, there is a failure of proof.

EQUITY — MISTAKE — RESTORATION OF CANCELLED MORTGAGE.—If a holder of a mortgage take a new mortgage as a substitute for a former one, and cancel and release the latter in ignorance of the existence of an intervening lien upon the mortgaged premises, although such lien be of record, equity, looking to substance rather than form, will, where the rights of third parties have not been prejudiced, disregard the cancellation of the former mortgage and restore it to its original priority.

Douglas county: M. L. PIPES, Judge.

Defendants appeal. Modified.

J. C. Fullerton, and E. B. Preble, for Appellants.

J. W. Hamilton, and W. R. Willis, for Respondents.

Opinion of the court—BEAN, J.

BEAN, J.—This is a suit, on the ground of fraud and mistake, to set aside a conveyance made by the defendant Buell and wife to Truman and Francis Hyde, who are joined as plaintiffs with John Pearce, and to reinstate a mortgage given by Buell and wife to Pearce prior to the date of the conveyance from Buell to the Hydés.

The facts material for the decision of the case are these: On May 3, 1889, the defendant Buell and wife executed to plaintiff Pearce a mortgage upon the premises described in the complaint to secure the payment of an indebtedness of \$1,129 with interest at the rate of eight per cent per annum, as evidenced by a certain promissory note for that amount due one year after date, which mortgage was on the same day duly recorded. On August 14, 1889, the defendants S. Marks & Co. recovered a judgment by confession against defendant Buell for \$1,251, which on the same day was duly entered in the judgment lien docket. On July 21, 1890, the plaintiffs Hyde, desiring to purchase, and the defendant Buell to sell, the mortgaged premises, it is alleged "that Buell falsely and fraudulently and with intent to cheat and defraud Pearce and the Hydés, represented to them that there were no liens or incumbrances upon said premises except the mortgage lien of plaintiff Pearce; and relying upon these representations and induced thereby," the said Hydés purchased said property, agreeing to pay therefor the sum of \$1,300, in manner following: To assume the payment of \$900 of the mortgage debt of Pearce, and to execute their note secured by mortgage upon the premises therefor; to pay \$334 in money to Pearce on said debt, and the remainder of the purchase price, \$66, to pay to said Buell. In pursuance of this agreement, Buell conveyed the property to the Hydés, and they executed their note and mortgage to Pearce for \$900; paid him \$334 in money, and paid the remaining \$66 to Buell. Pearce, induced by and relying upon the representations of Buell that the premises were free from all liens or incumbrances except

Opinion of the court—BEAN, J.

his mortgage, and in ignorance of the lien of Marks & Co., as a matter of accommodation to and for the convenience of Buell and the Hydes, accepted the note and mortgage of the Hydes and cancelled his former mortgage upon the record without intending in any way to relinquish his first lien upon the premises for the balance due him. Afterwards Marks & Co. caused an execution to be issued upon their judgment, and were proceeding to sell the land thereunder when this suit was brought to cancel the deed from Buell to the Hydes and reinstate Pearce's mortgage. By its decree the court below reinstated Pearce's mortgage for the entire amount originally due thereon and interest, cancelled and set aside the satisfaction thereof on the record, cancelled the deed from Buell to the Hydes and the note and mortgage given by them to Pearce, and ordered that the sum of \$455 paid by the Hydes to Pearce on his mortgage be returned to them. From this decree defendants appeal.

Although Pearce and the Hydes have joined in this suit as plaintiffs, their interests are separate and must be so considered by us.

The plaintiffs Hyde base their right to relief upon the alleged fraudulent representations of Buell concerning the liens upon the premises purchased by them, and their reliance upon the same in making the purchase. They have not testified in the case, nor is there any evidence whatever in the record, so far as we can ascertain, supporting or even tending to support the allegations of the complaint in this respect. It is true the evidence shows that Buell stated at the time of the sale and purchase that there were no liens or incumbrances on the land except Pearce's mortgage; but whether they were ignorant of the actual facts or relied upon this representation does not appear. The complaint is not verified by them, but by their co-plaintiff Pearce, so that it no where appears in the record that the Hydes are willing to swear that the representations of Buell in any way induced them to purchase

Opinion of the court — BEAN, J.

the land. For aught that appears in this record, they may have been fully informed, either from an examination of the record or from other sources of information, that Marks & Co. held a judgment lien against the land they were purchasing. If so, certainly they can not have the sale set aside on account of any representations of Buell in relation to the matter, even if false. The burden of proof is upon them, and they must prove the allegations of their complaint by a preponderance of the evidence before they can prevail in this suit. This they have not done or even attempted to do, and there is an entire failure of proof on their part. So much of the decree of the court below as is in their favor must therefore be reversed for want of evidence to support it.

Passing now to the case as made by the plaintiff Pearce, it clearly appears from the testimony that he accepted the note and mortgage from the Hydes for the balance due from Buell and cancelled the former mortgage on the record under a mistake and in ignorance of the lien of Marks & Co., and with no intention of waiving his prior lien. This was but a mere change in the form of the indebtedness growing out of the fact that Buell had sold the mortgaged premises to the Hydes who were to pay the Pearce mortgage as part of the consideration, and therefore, as a matter of convenience, the new note and mortgage from the Hydes was given. This mere change in the form of the indebtedness did not operate as a payment of the Buell mortgage or discharge the lien, because it was evidently not so intended by the parties.

“No change in the form of indebtedness or in the mode of payment will discharge the mortgage. A mortgage secures the debt and not the note or bond, or other evidence of it. No change in the form of the evidence, or the mode or time of payment, nothing short of actual payment of the debt or an express release will operate to discharge the mortgage.” (Jones Mort. § 924.) This is so both between

Opinion of the court—BEAN, J.

the parties and as to a subsequent lien holder. (Id. § 927.)

Nor did the giving of a new note with the names of the Hydes in place of Buell operate as a waiver of the original mortgage. (Jones Mort. § 929; *Pond v. Clarke*, 14 Conn. 334; *Hyde v. Tanner*, 1 Barb. 75.) In such case a court of equity will look through the form to the substance and keep alive the original security if it can be done without injury to third parties. No rule of law is better settled than if the holder of a mortgage take a new mortgage as a substitute for a former one, and cancel and release the latter in ignorance of the existence of an intervening lien upon the mortgaged premises, although such lien be of record, equity will, in the absence of the intervening rights of third parties, restore the lien of the first mortgage and give it its original priority. (Jones Mort. § 972; *Geib v. Reynolds*, 35 Minn. 331; *Bruse v. Nelson*, 35 Iowa, 157; *Downer v. Miller*, 15 Wis. 677; *Vannice v. Bergen*, 16 Iowa, 555; 85 Am. Dec. 531; *Robinson v. Sampson*, 23 Me. 388; *Corey v. Alderman*, 46 Mich. 540; *Cansler v. Sallis*, 54 Miss. 446.)

The fact that the mortgage was released in ignorance of the existence of the intervening lien, is in equity deemed such a mistake of fact as to entitle the party to relief, although such lien may have been of record. (*Bruse v. Nelson*, *supra*; *Cobb v. Dyer*, 69 Me. 494; *Geib v. Reynolds*, *supra*.)

To restore the mortgage of Pearce as a lien upon the mortgaged premises for the amount due him prior and paramount to the lien of Marks & Co., is but to prevent manifest injustice and hardship, and interferes with no superior intervening equities. The lien of Marks & Co. was obtained prior to the release of Pearce's mortgage, and therefore they have not in any way been misled by the discharge of the mortgage. They have advanced no new consideration in consequence of such release or changed their position in any way. With the mortgage restored

Opinion of the court—BRAW, J.

for the amount due Pearce, they will be in the same position as before the cancellation, no better and no worse. It would be inequitable and unjust to permit them to take advantage of plaintiff's mistake in cancelling his mortgage. The cancellation of a mortgage is but *prima facie* evidence of its discharge, and it may be shown that it was made by mistake, as is clearly the fact in the case here. Under such circumstances, Marks & Co. have no equity or claim to resist the older and superior equity of Pearce to a restoration of his original rights. The principle running through all the cases of this class, says BARCULO, J., "is, that when the legal rights of parties have been changed by mistake, equity restores them to their former conditions when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons." (*Barnes v. Camack*, 1 Barb. 392.) In such cases a court of equity will look through the form to the substance of the transaction and keep an incumbrance alive, or consider it extinguished as will best serve the purposes of justice and the intention of the parties. (*Barnes v. Camack*, *supra*; *Starr v. Ellis*, 6 Johns. Ch. *393.) It follows therefore that plaintiff Pearce is entitled to a decree reinstating his mortgage as a lien upon the premises described in the complaint for the amount due him, to wit, \$745, with interest at the rate of eight per cent per annum from July 21, 1890, prior and paramount to the lien of the judgment recovered by Marks & Co. against Buell, and if the parties so desire, a decree of foreclosure may be entered here.

The decree of the court below is therefore modified as indicated in this opinion, neither party to recover costs in this court.

Opinion of the court—Lord, J.

[Filed February 22, 1892.]

WILBERT F. KINCAID v. THE OREGON SHORT
LINE, ETC., RY. CO.

MASTER AND SERVANT—NEGLIGENCE—PRESUMPTION—FAILURE OF PROOF.—

In an action against a master by a servant to recover damages for injuries sustained on account of defective machinery, it is presumed that the master has discharged his duty to the servant by providing suitable appliances for the use of the servant in the employment and in keeping them in proper condition; and this presumption can be overcome only by affirmative proof, either direct or circumstantial, of negligence on the part of the master. Negligence cannot be inferred from the mere happening of an accident; and if the circumstances relied upon to show negligence are consistent with ordinary care on the part of the master, the charge of negligence will fail for want of proof.

Multnomah county: E. D. SHATTUCK, Judge.

Defendant appeals. Reversed.

W. W. Cotton, and Zera Snow, for Appellant.

Thos. O'Day, for Respondent.

LORD, J.—This is an action by an employé against his employer to recover damages for an injury received by reason of an alleged omission to have one of the draw-bars of one of the cars comprising the train safely keyed while engaged in the work for which he was employed. The particular facts alleged, upon which a recovery is sought, are: "That on said date the defendant failed to have the draw-bars which connected said cars comprising said train properly inspected, but on the contrary allowed the said train to be made up without having one of the draw-bars in one of the cars comprising same safely keyed. and without having the key to said draw-bar fastened with the usual split-ring in general use for that purpose; that by reason of said draw-bar being in said unsafe and dangerous condition, and said train being run at a high rate of speed over said rough track from La Grande to Haines, a distance of forty miles, the key which held said draw-bar in place jumped out, causing said train to part in two sections, so

22	35
25	394
29	5
30	654
22	35
43	342
22	35
48	37

Opinion of the court—LORD, J.

that when the front section thereof was stopped on the main line of said road, in order for plaintiff to uncouple the same, the rear section of said train, comprising nine cars, came up to and collided with the forward section, which collision was so violent that said entire train of twenty-one cars and engine was nearly completely wrecked and demolished, the said collision causing the injury of the plaintiff herein complained of."

These allegations the defendant denied and set up two defenses, which the plaintiff in his turn controverted; but as neither of them is material to the questions presented by this appeal, we may dismiss them without further consideration.

The judgment went for the plaintiff, and the defendant now seeks to reverse it for error in overruling its motion for nonsuit, and upon certain exceptions reserved to instructions given and to instructions asked and refused.

The bill of exceptions discloses that there were but two witnesses; the plaintiff testifying in his own behalf, and the car inspector on behalf of the defendant. Our first inquiry is, whether the plaintiff's testimony affords any proof of negligence. Upon this subject his testimony is to the effect that at the time alleged he was a brakeman in the employ of the defendant upon its railroad between La Grande and Huntington that the train in question was made up by a separate crew, upon whom devolved such duties and was turned over to the train crew, composed of himself and others, who took charge of and started with it to La Grande; that it was a part of his duty as such brakeman to uncouple cars at the various stations for the purpose of setting out such cars upon the side-tracks, and that he had received orders to set out a car at Haines station; that there was a steep grade a short distance from that station, and that the track at some places, owing to alternate freezing and thawing, was in a rough and uneven condition, but that flags were posted along such places to notify and

Opinion of the court—LORD, J.

caution the engineer to run the train slowly over them; that just before the train reached Haines station it had parted, but immediately upon its arrival there he got off and went between the cars to uncouple them, when the detached portion of the train came up and collided with the portion standing still, causing the cars between which he was standing to catch his arm and to injure it so badly that its amputation afterwards became necessary; that such was the force of the collision that the heads of the draw-bars were driven out of sight and much damage done to the cars and their connections; that upon examination immediately after the accident, it was found that one of the draw-bars where the train was parted was pulled out and that the key was gone. His testimony also shows how a draw-bar is constructed and attached to the cars to connect them; and in explanation of the purpose of the key and the split-ring, it shows that in the rear end of the spindle of the draw-bar there is a hole through which passes a wrought iron or steel key, and that through the hole in this key there is usually placed a split-ring or piece of wire to hold the key in the spindle; that this key will not stay in its place unless it is securely fastened in that wise; that "it will jump out with the least jar, and the train will separate just as easy as if it was not coupled at all"; that it is not an unfrequent occurrence for trains to break apart on account of a draw-bar pulling out; that "sometimes they run for a month and do not break apart, and sometimes they break apart two or three or four times on a trip"; that sometimes this occurs in starting out from a station in consequence of a too sudden movement or jerking of the train by the engineer, which breaks off the key-ring, but that "these key-rings, if properly in when the train starts, and the train is properly handled, will not jump out"; that sometimes the breaking apart of the train "is caused by steady pulling; if the link treads upon the key the key will bend; it will be on a kind of slant, and

will work up and down until it comes out." He also testifies that they were eight hours late, were running quite rapidly, and had gone nearly forty miles when the accident happened.

The refusal of the trial court to grant the motion for nonsuit, substantially upon this state of facts, constitutes the first assignment of error. The contention is that the evidence fails to show that the defendant was guilty of negligence or failure of duty toward the plaintiff. In cases of this sort, the burden of proof is upon the plaintiff to establish the particular negligence alleged; it cannot be found without evidence, nor can it be presumed. But on the other hand, in the absence of anything to the contrary, it will be presumed that the defendant has performed its duty. And this presumption of a proper performance of duty applies alike to both parties, and is a rule of universal application which must prevail until overcome by proof. Mr. Wood says "The servant, seeking to recover for an injury, takes the burden on himself of establishing negligence on the part of the master and due care on his own part. And he is met by two presumptions, both of which he must overcome in order to entitle him to a recovery: first, that the master has discharged his duty to him by providing suitable instrumentalities for the business and in keeping them in condition; and this involved something more than the mere fact that the injury resulted from a defect in the machinery. It imposes upon him the burden of showing that the master had notice of the defect, or in the exercise of that ordinary care which he is bound to observe, he would have known it. When this is established, he is met by another presumption the force of which must be overcome by him, and that is, that he assumed all the usual and ordinary hazards of the business." (Wood Mast. & Ser. § 382; 2 Thomps. Neg. 1053; Sherm. & R. Neg. § 99.) There must be some affirmative proof of negligence. It is not enough for the party to

Opinion of the court—LORD, J.

merely show the injury or accident, but he must produce some evidence tending to show that the negligence of the defendant caused it. This is not one of the cases where proof of the accident is *prima facie* evidence of negligence; but it is one of the cases where the law presumes a proper performance of duty upon the part of the defendant, and the burden is imposed upon the plaintiff to show its negligence in reference to the particular matter alleged in producing the injury. (*Knahlla v. O. S. L. etc. R. R. Co.* 21 Or. 136; *Railroad Co. v. Wagner*, 33 Kan. 660.)

Nor do we think that the trial court was unmindful of this distinction. It recognized that the burden was on the plaintiff to offer some evidence conducing to show that the plaintiff's injury was occasioned by the negligence alleged, but it evidently considered that the absence of the key after the accident, under the facts and circumstances as shown by the evidence, afforded an inference of negligence which it was the province of the jury to draw. This inference is that from the circumstances of the case the absence of the key indicates or leads to the conclusion that the key of the draw-bar was not fastened with a split-ring or other safe device to hold the key in its place when the train was turned over to the trainmen, otherwise the key would not have worked out and the injury occurred; and as the want of a split-ring in the key to fasten it is a defect in the appliance or car of a kind which a proper inspection would have discovered, it results that the defendant is chargeable with notice of what a proper inspection would have disclosed. In this view it is plain that the trial court did not consider that the mere happening of the accident proves negligence *prima facie*, as contended by counsel, but that it considered that negligence might be shown from circumstances, without direct proof of it by the testimony of eye witnesses; and that when the circumstances in evidence were such that different inferences or conclusions might be drawn from them by different minds, it was for the jury and not

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Opinion of the court—LORD, J.

for the court to decide whether or not negligence in fact existed. But from the circumstances of the case as disclosed by his evidence, the absence of the key after the accident does not warrant the inference of negligence, because it is consistent with the exercise of due care. It is when the circumstances are such as to lead to the inference of negligence that they are to be submitted to the jury to say whether or not there was negligence. While negligence is ordinarily a question of fact for the jury, it is only so when the facts and circumstances would authorize the jury to infer it.

The defendant is not an insurer that its cars and appliances are in a safe condition. The measure of its duty is to exercise reasonable care in this regard, and *prima facie* it is presumed to have done so.

The testimony for the plaintiff shows that there is a liability of the split-ring which fastens the key to break and the key to work or jump out, and the cars to separate in the ordinary uses to which trains are subjected, or from the negligence of his fellow-servants in their operation. In such case, the absence of the key affords no presumption of negligence, but is consistent with due care. It may have worked or jumped out, in running over the road, or from negligence of a fellow-servant in the operation of the engine, although properly fastened. It would not necessarily follow from the absence of the key that it was not properly fastened, but it may be attributed to the ordinary liability resulting from use or from the carelessness of his fellow-servants, as indicated by his testimony.

In *R. R. Co. v. Hagan*, 11 Brad. 498, the accident was caused by the absence of any nut to hold the wheel on top of the brake-rod, in consequence of which the wheel came off, when the defendant took hold, and precipitated him to the ground. He charged that the company negligently permitted this car to be in this dangerous condition when it either knew or ought to have known of its defective charac-

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Opinion of the court—LORD, J.

ter. The court says: "The only evidence relied upon for a recovery in this case is the absence of the nut from its proper place at the time of the accident. Unless we hold the appellant an insurer of the safe condition of all its cars, this is not sufficient to sustain a recovery. It may be well attributed either to the ordinary liability to accidents resulting from use, or from neglect of fellow-servants; in neither of which cases would the company be liable without actual or constructive notice." Nor is this all. He testifies that if the split-ring is not in the key the "key will jump out with the least jar" during the running of the train, and that "the train will separate just as easy as if it were not coupled at all." Now, he testifies that the train comprising twenty-one cars had, on account of being eight hours behind time, run nearly forty miles at a rapid rate of speed over a road, portions of which were rough and uneven, and up a grade quite steep, before the cars separated and the accident happened. In view of this testimony, the key must have been fastened when the train was turned over and the plaintiff's duties commenced, or else the key would have jumped out long before they had gone such a distance over a road of that kind and in that condition. Taking his testimony as true, this conclusion is inevitable.

His testimony further shows that just before the train reached the station it had come up a steep grade, and that on the top of the hill there was a soggy place, where the road was rough and uneven. It is clear that the key was not out when the train came up this grade, for if it had been the train would have been separated and the rear section would have run down the grade. But it likewise shows that the key would sometimes work out, letting the draw-bar pull out and the train separate from steady pulling although it may have been properly fastened at the start. This steep grade was such a place as required steady pulling and a hard strain, and furnished the occasion for the key to become bent, or, as he says, "on a

kind of slant," and cause it "to work up and down until it comes out." Of course, when this state of things exists, necessarily the fastening must give way on the key, whether a split-ring or other device, before the key can work out. Looking at the facts and circumstances, is not the inference reasonable that the steady pulling up this grade had the effect to cause the key to bend, and when it commenced to work up and down to break its fastenings, so that when the train reached the top of the hill where it was soggy and the road was rough and uneven, the key, having no fastening, jarred out and the train parted with the consequences which occurred shortly thereafter? This testimony shows the opportunity for such an occurrence as this accident, notwithstanding the key may have been fastened at the start with a split-ring, and is therefore consistent with prudence and due care, and not with negligence on the part of the company.

Again, his testimony shows that the fastening of the key may be broken and the key come out, causing the train to separate, from taking up the slack, from jerking, and from improper management of the train by the engineer; that the breaking apart of the train from these and other causes is a frequent occurrence, though not an every-day occurrence, so that if the key were properly fastened and every requirement of duty performed, still there would be a liability of the key coming out and the train parting despite these precautions. The burden of showing negligence rests on the plaintiff; and before he can be entitled to a recovery he must prove a state of facts that warrants the inference of negligence; he can not rest his case upon facts as consistent with due care as with negligence. "It is a rule of the law of evidence of the first importance that where the evidence is equally consistent with either the existence or non-existence of negligence, it is not competent for the judge to leave the matter to the jury. There must be some affirmative proof of negligence." (WILLIAMS,

Opinion of the court—LORD, J.

J., in *Cotton v. Wood*, 8 C. B. N. S. 566.) According to plaintiff's testimony, this accident may have occurred from any of these various causes and the defendant have been without fault. The absence of the key does not warrant the inference from the circumstances that it was not fastened with a split-ring, otherwise the key would not have worked out, for his testimony shows that it may have been properly fastened when the train started, and came out afterwards by steady pulling, or in running the train, or in its mismanagement by the engineer, hence it cannot be said that an inspection would have disclosed a defective appliance—a key without a split-ring. The case is not like *Spicer v. Iron Co.* 138 Mass. 426, where the defect occurred by reason of a defective hook. The plaintiff proved by witnesses how the hook appeared after the break, and showed that there was a visible crack or "aw" in the hook, and the court held that the evidence tended to show that a careful inspection would have revealed the weakness of the hook, and therefore there was evidence of negligence on the part of the defendant to support the verdict. It is not enough for the plaintiff to base his injury upon the absence of the key unless the inference is warranted that the defendant is to blame for it. As its absence may be accounted for consistently with prudence and due care, the inference of negligence sought to be charged is not warranted. "Mere proof of an injury," said HOLT, C. J., "with attending circumstances showing that the party charged with neglect may be blameless, or may be at fault, will not do. In such a case there is no evidence tending to show the injury was due to neglect. Circumstances are merely presented upon which one may theorize as to the cause of the accident." (*Hughes v. R. R. Co.* Ky. 16 S. W. Rep. 275.) The presumption being that the defendant performed his duty, and that the car and its connections were in a reasonably safe condition when turned over to the trainmen, the plaintiff must produce some affirmative proof of negligence derived either from

Opinion of the court—LORD, J.

the testimony of witnesses, or from circumstances of the case, or he cannot recover. As the circumstances show that the accident may have occurred consistently with a due performance of duty, they do not warrant the inference of negligence.

As a consequence, the judgment must be reversed with directions to the court below to enter a judgment of nonsuit.

[Filed February 22, 1892.]

JOHN S. ELLIOTT v. TURNER OLIVER.

MANDAMUS—SUFFICIENCY OF WRIT—STARE DECISIS.—A writ of mandamus must itself state facts sufficient to authorize the court to grant the relief sought, and will not be aided by reference to the petition. *McLeod v. Scott*, 21 Or. 94, followed and approved.

CONSTITUTIONAL LAW—PRACTICE.—This court will avoid deciding upon the constitutionality of a statute whenever there appears in the record any other ground sufficient to sustain a proper disposition of the case in judgment.

Union county: JAMES A. FEE, Judge.

Plaintiff appeals. Affirmed.

T. H. Crawford, Shelton & Carroll, H. H. Hewitt, C. E. Wolverton, and Tilmon Ford, for Appellant.

Robert Eakin, Cox, Teal & Minor, for Respondent.

LORD, J.—This is an action of mandamus brought by the plaintiff, as recorder of conveyances for Union county, against the defendant as county clerk of said county, to recover the possession of certain records to which he claims to be entitled by virtue of his office. Upon the petition being filed, an alternative writ was issued, and to this writ the defendant demurred, and the trial court sustained the demurrer and dismissed the action. From this judgment of dismissal the plaintiff appeals, and assigns as error the sustaining of the demurrer. The demurrer to the writ, among other grounds, specifies that it does not state facts

22	44
28	211
29*	1
37*	907
22	44
28	580

Opinion of the court—LORD, J.

sufficient to constitute a cause of action; and the court below so held, for the reason that the act of the legislative assembly of 1889, creating the office of recorder of conveyances, is unconstitutional and void. In that view it would not be possible for the plaintiff, who claims to hold the office by virtue of such act, to state facts sufficient to constitute a cause of action that would entitle him to the possession and custody of the records, which he seeks to obtain by this proceeding.

We ought, however, before we proceed to consider the objection urged by the defendant to the constitutionality of the act, to be satisfied that the writ stated facts sufficient to involve its consideration, and that its determination was necessary in the decision of the cause. Under the code the petition upon which the writ issues is no part of the pleadings, and the writ must be sufficient in itself to show precisely what is claimed, and the facts upon which the claim is made. Section 569 provides that the alternative writ shall state concisely the facts according to the petition, showing the obligation of the defendant to perform the act, and his omission to perform it, and command him, that immediately after the receipt of the writ, or at some other specified time, he do the act required to be performed, or show cause before the court or judge thereof by whom the writ was allowed, at a time and place therein specified, why he has not done so, and that he then and there return the writ with his certificate annexed of having done as he is commanded, or the cause of his omission thereof. Section 598 provides that on the return day of the writ, or such further day as the court or judge thereof may allow, the defendant on whom the writ shall have been served may show cause by demurrer or answer to the writ in the same manner as to a complaint in an action. The verified petition forms the basis upon which the court may issue the writ, but when issued, it ceases to have any office to perform. The facts stated in the writ should be the same

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facts stated in the petition for the writ, as no resort or reference can be had to the petition in aid of the writ.

“There can be no question,” said STRAHAN, J., “as to the proper practice. The writ itself ought to contain every material fact alleged in the petition upon which the plaintiff relies, making it the duty of the defendant to act or do the particular things which the plaintiff demands.” (*McLeod v. Scott*, 21 Or. 94.) It is the writ which is the foundation of all the subsequent proceedings and which may be demurred to or answered in the same manner as a complaint in an action. It is made to serve the same purpose as the complaint in other actions, and therefore must state all the material facts and show a clear right to the relief demanded. To the writ itself then we must look to determine whether the facts stated are sufficient to support the action. It simply recites that whereas it manifestly appearing that the plaintiff is entitled to the possession of the books, papers, and records, etc., which he alleges you (defendant) illegally retain in your possession and custody, therefore we command you that immediately upon the receipt of this writ that you do deliver to the plaintiff the following records, etc., or that you show cause at a day specified why you have not done so.

It nowhere appears from the writ that the plaintiff is recorder of Union county, or ever was elected such recorder, or by what right or authority he claims or demands the possession of such records, nor does it appear that defendant is county clerk, or by what right or authority he retains or withholds such records. It does not set forth the facts on which the plaintiff relies nor apprise the defendant of the grounds upon which the remedy is sought.

It is not possible for the court to determine from the allegations in the writ who is entitled to the custody of the records in question. The writ, in effect, does no more than to command the defendant to deliver such records or show cause why he has not done so. There are absolutely no

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facts stated in it upon which an action can be based. Treated as a complaint, it does not state facts sufficient to constitute a cause of action, and can form no basis on which a judgment can stand. Nor is this result denied; for counsel for defendant admit that the writ does not state such facts in itself as would justify the court in rendering any order upon it, but they say, owing to the importance of the question as a matter of public concern, they are willing to waive all matters of form and treat the petition and writ together, so as to supply the necessary facts and to have the case determined upon its merits. If we clothe the writ or aid it with the facts alleged in the petition, then the writ contains facts sufficient to state a cause of action, provided the act of the legislature creating the office of recorder is constitutional; but if the act be unconstitutional, then the writ does not state facts sufficient to constitute a cause of action. The petition is no part of the pleadings; and the writ, as it stands, states no cause of action unless it be aided by the facts alleged in the petition, and then only in the event that the act is constitutional. Can we, then, disregard the demurrer and supply from the petition the want of facts in the writ in order to raise and determine the constitutional question when a decision upon that point is not necessary as the record stands? In a word, will the court consent to have a case made, when the record certified to us presents none, in order to pass upon the validity of a statute? As a general rule, a court will not pass upon a constitutional question and decide a statute to be invalid unless a decision upon that very point becomes necessary to the determination of the cause.

"The decision of a question involving the constitutionality of an act of the legislature," said Mr. Chief Justice MARSHALL, "is one of the gravest and most delicate of judicial functions; and while the court did meet the question with the utmost fairness when its decision was indispensable, it is the part of wisdom, and a just respect for t e

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legislature renders it proper to waive it if the cause in which it arises can be decided on other points." (*Ex parte Randolph*, 2 Brock. 448.)

"While the courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics; they will not seek to draw in such weighty matters collaterally nor on trivial occasions. It is both more proper and more respectful to a coördinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extra judicial disquisition is entitled." (STUART, J., in *Hoover v. Wood*, 9 Ind. 287.)

"In any case therefore," says Judge COOLEY, "where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record present some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable." (Cooley's Const. Lim. *163.)

In view of these considerations and the further consideration, that if we resurrect the petition and use it to supply the writ with sufficient facts to raise the constitutionality of the act, and should hold the same to be constitutional, there would still remain for us to determine the respective rights of the parties in regard to the possession of these records under the statute which, if we should likewise decide adversely to the defendant, would require us to overrule the demurrer, reverse the judgment, and award a peremptory writ; or, on the other hand, to affirm the judgment on the ground that the act creating the office of recorder of conveyances is void. It does not seem to us

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that the petition, which is no part of the pleadings, can be used and its facts appropriated to clothe the writ with sufficient facts to make a case for this purpose. It is not the proper practice and would create a bad precedent. The fact that we would be likely to declare the act to be constitutional can not affect the question nor change our duty in the premises.

While we should be glad to accommodate counsel, who have presented to us a very able and interesting argument, we would be unmindful of the obligations which our station imposes and the respect due to a coördinate branch of the government to undertake to pass on the validity of a statute when its consideration was not presented by the facts of the case for our determination. For these reasons we affirm the judgment of dismissal, not because the act is unconstitutional, but for want of sufficient facts in the writ to sustain a judgment.

[Filed February 22, 1892.]

THE SUN PUBLISHING CO. v. THE MINNESOTA
TYPE FOUNDRY CO.

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CONTRACTS—TIME OF PERFORMANCE—CONDITION PRECEDENT.—In contracts for the sale of personal property, if time appear to be of the essence thereof, on a fair consideration of the language and circumstances, stipulations in regard to it will be construed as conditions precedent.

SALE OF CHATTELS—ENTIRETY OF CONTRACT.—The consideration being entire, and the goods having been ordered for a particular purpose known to the seller, the buyer is not bound to accept all or any part of those tendered unless they all substantially meet the requirements of the contract, although some of the goods may be of the kind ordered.

CONTRACT OF SALE—INSPECTION OF GOODS.—In offering delivery under contracts for the sale of personal property, the vendor is bound to give the vendee a reasonable opportunity to satisfy himself by inspection of the goods, before paying for them, that they are in accordance with the contract.

Coos county: M. L. PIPES, Judge.

Defendant appeals. Affirmed.

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The questions of law argued upon this appeal arise upon the findings of the court below, which findings are as follows: "The above-named action came on to be heard at the regular term of said court, the plaintiffs appearing by their attorneys, J. M. Siglin and S. H. Hazard, and the defendant by its attorney, John Gray; and the parties consenting and agreeing, a trial by jury was waived, and the trial was had before the court alone; and after hearing the evidence and the argument of counsel, the court being in doubt what decision ought to be made, took the same under consideration, and now being fully advised in the premises, the court finds the following facts and conclusions of law:

"1. That plaintiff and defendant made the agreement and contract evidenced by the following writings, at the dates therein respectively set out—that is to say, on the seventh day of October, 1890, the plaintiff A. W. Sefton, and plaintiff J. M. Siglin by said Sefton, his duly authorized agent, entered into a contract of which the following is a copy, to wit:

"'PORTLAND, October 7, 1890.

"'The Minnesota Type Foundry Company, by its agent, Frank E. Hall, agrees to sell to A. W. Sefton and J. M. Siglin of Coos Bay, Oregon, a printing outfit comprising a listed invoice of material at the following rates of discount: on all type made by us, 32½% off; on machinery, a net price; on all other material under the 25% column, 30%; wood type and all other type from other foundries. The above f. o. b. at St. Paul, except the O. S. Gordon press. Two-thirds with order; balance, when goods are invoiced.

"'A. W. SEFTON,

"'for self and Siglin.

"'F. E. HALL.'

"That on the seventh day of November, 1890, the plaintiff, referring to said contract above set out, sent a list of machinery and material wanted under said agree-

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ment, which said order was in words and figures as follows, to wit:

“MARSHFIELD, Oregon, November 7, 1890.

“*Minnesota Type Foundry Co., 72, 74 and 76 East Fifth Street, St. Paul, Minn.*—GENTLEMEN: Enclosed herewith find list of machinery and material wanted under agreement with your Mr. Frank E. Hall, dated at Portland, on the seventh ultimo; also check on New York for twelve hundred dollars, payable to your order in accordance with said agreement. As we desire to make first issue January 7, 1891, it is desirable that the material be here not later than December 10th, proximo, hence will ask you to ship at once and notify us of date of shipment. Mark goods Sun Publishing Co., Marshfield, Oregon, care of Coos Bay Coal and Navigation Co., San Francisco, Cal. All type, rules, leads, slugs, metal furniture, etc., are to be on the point system. None other will be accepted except the minion Clarendon points, which are to be of the old MacKellar, Smith & Jordan body. Of these we want about one pound, periods, commas, colons, semicolons, hyphens, apostrophes, exclamations, and interrogations, apportioned as like amount would be in putting up points (fonts). Have large font of the type but no points. Names used in list of material wanted are those used in several books and sheets selected from. As soon as possible have indicated where things were found not in your pony specimen book. If there is any material difference as to cheapness in wood type made on end wood and holly, send holly type 15 ems and upwards; below that size end wood. If you are making any of the material ordered from other books than yours, substitute your make. The sheet of cuts has failed to come to hand. Make out your bill at list prices, segregating the items so that the several different discounts come together and put the total list price at foot of each; then total actual price with discount off on separate sheet.

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“Trusting that you will be prompt in shipment as this is of vital importance to us, we are, yours, respectfully,

“THE SUN PUBLISHING COMPANY,

“care SIGLIN & LUSE,

“PER A. W. SEFTON, Business Manager.”

“Enclosed in said order as given above was the list of goods ordered therein, as set forth in the defendant’s answer, and not disputed in the pleadings, which order and list were duly received by the defendant.

“2. That there was no other contract or agreement between the plaintiff and defendant other than that set out in finding No. 1, above.

“3. That the defendant shipped the goods described in the list sent, which said order is set out in finding No. 1, except certain goods to be hereafter described in a subsequent finding, to Flanagan & Bennett, bankers, at Marshfield, Oregon, together with an invoice of the goods so shipped, and the bills of lading thereof, and a draft for \$580.59, which was claimed to be the balance of the purchase price for the goods so sent, and which draft was made payable to Flanagan & Bennett, or order, and was directed to the plaintiffs, and was drawn by the defendant. The shipment was made in several parts from November 25, 1890, to December 8, 1890, and defendant directed the said Flanagan & Bennett to deliver the said goods to plaintiff when they should pay said draft, and they were also directed to exhibit the invoices of said goods to plaintiff upon presentation of the said draft.

“4. Flanagan & Bennett did on the thirtieth day of December, 1890, deliver to plaintiffs the said invoices of the goods so shipped to them, and presented the said draft, and offered to deliver the bills of lading of the said goods, so shipped to them, upon the payment of said draft; but the plaintiffs refused to pay the said draft or receive the said bills of lading or said goods, for the reason, as then stated

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by them to said Flanagan & Bennett, that the goods were not in all things the kind ordered, and were such as they did not want.

"5. That the items in the list of goods ordered, as stated in a former finding, of 175 pounds of long primer No. 11, and of 150 pounds of brevier No. 13, were not filled or sent in the shipment of the goods sent, or at all, but that instead thereof the defendant sent in said shipment 176½ pounds of long primer and 151 pounds of brevier of a different face from that ordered in said order; that said order was made by a reference to a specimen book furnished by defendant to plaintiffs containing the samples of the type they sold, and were in said order designated by numbers appearing on said specimen book; that defendant wrote to plaintiff, which letter was received by plaintiffs before they received the invoices as aforesaid, to the effect that they could not fill the order as to the said long primer and brevier type, but that they substituted therefor a type of another style of face, which was preferable, and was being extensively used by other newspapers.

"6. That in the printing business the face of type constitutes a material and essential part of the type according to the particular use it is to be put to, and the tastes and wishes of the printer who uses it, and a difference in the face of type is a material and essential difference.

"7. That defendant did not mark the goods shipped by it to the Sun Publishing Company, or to Marshfield, Oregon, or to the care of the Coos Bay Coal & Navigation Company, San Francisco, Cal., but they were shipped only as set out in finding No. 3.

"8. That the reasonable and the contract value and price of the goods ordered, is the sum of \$1,780.59, of which the plaintiffs have paid the defendant the sum of twelve hundred dollars, and no more; that the reasonable and contract value and price of the goods ordered which

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were not sent is \$169.87, and of the goods sent and not ordered and not received, \$169.87.

"9. That the plaintiff, before the commencement of this action, duly notified the defendant of its refusal to take or receive the said goods, or any of them, and duly demanded a return of the twelve hundred dollars paid defendant on said order, and that defendant has refused and still does refuse to pay the same or any part thereof.

"CONCLUSIONS OF LAW.

"1. That the contract and order set out in the findings of fact are an entire and non-severable contract, and plaintiff was not obliged to accept and receive any part of the goods ordered unless defendant filled substantially the order as to all the goods ordered. It being not so filled, plaintiff was not obliged to accept the goods sent to Flanagan & Bennett.

"2. Defendant not having complied with the conditions of the contract on its part, is not entitled to recover any part of the price or value therefor, the goods having been refused, nor to have plaintiff receive or pay for any of the goods shipped to Flanagan & Bennett.

"3. The plaintiff is entitled to recover the sum of twelve hundred dollars from the defendant, with interest thereon from the first day of January, 1891, at the rate of eight per cent per annum.

"It is, therefore, ordered and adjudged that plaintiff have and recover from the defendant the sum of twelve hundred dollars, with interest thereon from the first day of January, 1891, at the rate of eight per cent, to wit, the total sum of \$1,253.33, and legal interest thereon from the entry of the judgment herein until paid, and for its costs to be taxed, and that the property hereinbefore attached be sold to satisfy this judgment and costs and accruing costs.

"MARTIN L. PIPES, Judge."

Argument of counsel.

Cox, Teal & Minor, for Appellant.

The two instruments set forth in finding No. 1 must be construed together, and so construed they constitute a contract between the parties—on the part of defendant to sell and deliver personal property; on the part of plaintiff, to accept, receive, and pay for such property in accordance with the terms of the contract. This contract is a severable, and not an entire contract. (*Norris v. Harris*, 15 Cal. 256; *Tenny v. Mulvaney*, 8 Or. 129; 2 Par. Con. 29, 31, 517; *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351; *Quigley v. De Haas*, 82 Pa. St. 267; *Carleton v. Woods*, 8 Foster, 290; 3 Am. & Eng. Enc. Law, 916; *Scott v. Kittanning Coal Co.* 89 Pa. St. 231; 33 Am. Rep. 753; *Young etc. Mfg. Co. v. Wakefield*, 121 Mass. 91; *Downer v. Thompson*, 6 Hill, 298; *Southwell v. Beezley*, 5 Or. 458.)

The contract between the parties was performed in part by both parties. Having been so performed, neither party could rescind without the consent of the other except by placing the other party in as good a position as that which he occupied before the contract was executed. (1 Benj. Sales, §§ 490, 512, 565, 572, 573.)

The findings further show that the only breach of the contract which plaintiff claims was in not sending each item ordered. They further show that defendant promptly informed plaintiff that it could not furnish these items, and would substitute other goods suitable for the purpose, and as good or better than those ordered. As the plaintiff took no notice of this letter, it is presumed to have assented to this change. (*Downer v. Thompson*, 6 Hill, 208; *Smith v. Pettee*, 70 N. Y. 13; *Barton v. Kane*, 18 Wis. 262; *Boothby v. Scales*, 27 Wis. 637; *Carondelet Iron Works v. Moore*, 78 Ill. 65; *Haase v. Nonnemacher*, 21 Minn. 486; *Paige v. McMillan*, 41 Wis. 337; *Hadley v. Prather*, 64 Ind. 137; *Reed v. Randall*, 29 N. Y. 359; 86 Am. Dec. 305; *Owens v. Sturges*, 67 Ill. 366; *Doane v. Dunham*, 65 Ill. 512.)

Argument of counsel.

S. H. Hazard, for Respondent.

When trial is by the court, the findings of fact need only cover the material issues made by the pleadings. (*Philomath College v. Hartless*, 6 Or. 158; 25 Am. Rep. 510; *McFadden v. Friendly*, 9 Or. 222; *McEwen v. Johnson*, 7 Cal. 260; *Breeze v. Doyle*, 19 Cal. 101.)

If the findings of fact do not cover all of the material issues made by the pleadings, it is the duty of a party to apply to the court for additional findings, and if he fail to do so, cause will not be reversed on that ground, if the findings are sufficient to support the judgment. (*Luce v. Isthmus Transit Ry. Co.* 6 Or. 125; 25 Am. Rep. 506; *Logan v. Hale*, 42 Cal. 645.)

Ambiguous findings are to be given a construction that accords with pleadings and supports judgment. (*Whillock v. Manciet*, 10 Or. 166; *Coveny v. Hale*, 49 Cal. 555; *People v. Hager*, 52 Cal. 189; *Osborne v. Clark*, 60 Cal. 623.)

The particular errors relied upon must be specified in a notice of appeal; and it is clearly not sufficient to say that the court erred in making a particular finding, when there is no bill of exceptions, and nothing in the record to show the particular error intended to be charged. (*State v. McKinnon*, 8 Or. 487; *N. P. Terminal Co. v. Loewenberg*, 11 Or. 286; *Weissman v. Russell*, 10 Or. 73; *State v. Drake*, 11 Or. 396; *Fulton v. Earhart*, 4 Or. 61; *Hallock v. Portland*, 8 Or. 29.)

The fact that plaintiff ordered from defendant certain specified goods, and sent to defendant \$1,200 as part payment thereon, could not vest in the plaintiff any property in the goods ordered, until the goods had been appropriated to the contract. (*Benj. Sales*, 428; *Hedden v. Roberts*, 134 Mass. 38; 45 Am. Rep. 276.)

When the vendor, under the contract, has the power to select and appropriate the goods to the contract, the title in the goods does not pass, unless he exercise the power in cou-

Argument of counsel.

formity with the contract. He cannot select a greater or less quantity, or different kinds of goods than those ordered, and if he does, the buyer may refuse to receive the goods and recover any part of the purchase price, which may have been advanced. (Benj. Sales, §§ 505, 506, 512, 38, 910-927; *Bruce v. Pearson*, 3 Johns. 534; *Corning v. Colt*, 5 Wend. 256; *Leeds v. Dunn*, 10 N. Y. 472; *Brewer v. Housatonic R. R. Co.* 104 Mass. 593.)

The acceptance of an offer may be sometimes signified by performance alone; but in such case, the performance must be strictly in accordance with the offer. And where one person orders from another a designated quantity and kind of goods, and directs the manner of shipment, the seller must comply with the order as to kind, quantity, and mode of shipment, and if he fail so to do, the buyer may refuse to receive the goods. (Benj. Sales, § 38; 1 Pars. Cont. 476, 477; 2 Benj. Sales, §§ 918, 1030, 1032; *Downer v. Thompson*, 6 Hill, 208; 3 Am. & Eng. Enc. Law, 846, 858; *Eliason v. Henshaw*, 4 Wheat. 225.)

The findings show that defendant furnished plaintiff a book describing the material, to use in ordering goods, and that the goods were ordered from the book so furnished; and in such case the law requires that the goods offered to be delivered must be the same as the description or sample, and if they were not, plaintiff had a right to refuse to accept the goods on that ground. (2 Benj. Sales, §§ 918-925, 977; *Bradford v. Manly*, 13 Mass. 139; 7 Am. Dec. 122; *Perley v. Balch*, 23 Pick. 283; 34 Am. Dec. 56; *Fisk v. Tank*, 12 Wis. 276; 78 Am. Dec. 737; *Boothby v. Scales*, 27 Wis. 626; *Warder v. Fisher*, 48 Wis. 338; *Howe Machine Co. v. Rosine*, 87 Ill. 105; *Jack v. Des Moines etc. R. R. Co.* 53 Iowa, 399; *Flint v. Lyon*, 4 Cal. 17; *Polhemus v. Heiman*, 45 Cal. 573.)

In many of the cases cited *supra*, the goods had been accepted by the buyer; but in the case at bar, plaintiff refused to accept on the ground that defendant had failed to comply with the order, and in such case vendor must show

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compliance. (*Southwell v. Beezley*, 5 Or. 143; *Benj. Sales*, § 48.)

In offering delivery, the vendor is bound to give the buyer an opportunity of examining the goods so that the latter may satisfy himself whether they are in accordance with the contract. (*Benj. Sales*, §§ 910, 976, 1042.)

The buyer is not bound to comply with the contract at all, but may rescind it, if the seller refuse to let him examine the goods to see if they are in accordance with the contract. (*Benj. Sales*, § 1049.)

The rule is that when a party claims the benefit of a contract he must allege and prove compliance with all of its terms on his part. (*Hardwick v. State Ins. Co.* 20 Or. 556.)

When the vendor fails to deliver goods in accordance with the order, and the vendee has paid the whole or a part of the purchase price of the goods to be delivered, the vendee may sue for breach of contract, or bring an action against the vendor for money had and received, and obtain judgment for the amount paid with interest from the time it was paid. (*Nash v. Towne*, 5 Wall. 689; *Benj. Sales*, § 1305; 2 *Greenl. Ev.* § 124; 1 *Chitty on Pl.* *385; *Hoxter v. Poppleton*, 9 Or. 481; *Stewart v. Phy*, 11 Or. 335; *Peterson v. Foss*, 12 Or. 81.)

STRAHAN, C. J.—The most that can be claimed for the writing signed by F. E. Hall on the seventh of October, 1890, is that it is an offer on the part of the defendant to sell to A. W. Sefton and J. M. Siglin a printing outfit, comprising a listed invoice, at certain rates of discount; and the letter addressed to the defendant by Siglin & Luse under date of November 7, 1890, enclosing list of machinery and material wanted, was a notice to the defendant that Messrs. Siglin & Luse were willing to buy the outfit under the terms previously proposed to Sefton & Siglin, and a request that the same be billed and forwarded to them in a particular manner, and they enclosed their check with

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said order for \$1,200. The question therefore to be determined is whether or not the defendant so complies with its offer to sell and the plaintiff's order as to create a legal liability or duty on the part of the plaintiff to receive the material shipped and to make payment therefor. The plaintiff directed the defendant to mark goods "Sun Publishing Co., Marshfield, Oregon, care of Coos Bay Coal & Navigation Co., San Francisco, Cal." Instead thereof, the defendant marked and shipped the goods to Flanagan & Bennett, bankers, at Marshfield, Oregon, together with an invoice of the goods so shipped, and bills of lading thereof, accompanied by a draft for \$580.59, which was the balance claimed to be due for said goods. The shipments were made in several parts, from November 25, 1890, to December 8, 1890. Whether this departure from the plaintiff's instructions would of itself be sufficient to justify its refusal to take the goods, it seems is unnecessary for us to determine at this time; but some of the authorities to which our attention has been directed appear to hold as much. (*Bruce v. Pearson*, 3 Johns. 534; *Corning v. Colt*, 5 Wend. 254; *Eliason v. Henshaw*, 4 Wheat. 225.) But however this may be, we think, under the facts found by the court, the plaintiff was not bound to receive or pay for the outfit forwarded by the defendant company for other reasons.

On the thirtieth day of December, 1890, Flanagan & Bennett presented the draft for balance of bill to the plaintiff, with invoices of the goods, and offered to deliver the bills of lading, but the plaintiff refused to receive the same or to pay said draft, and a question is made by the plaintiff that its order as to time of shipment and delivery was not complied with. By its order they informed the defendant "as we desire to make the first issue January 7, 1891, it is desirable that the material be here not later than December 10, proximo, hence will ask you to ship at once and notify us of date of shipment."

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The principle contended for by counsel for respondent is stated in 1 Parsons on Cont. *538, as follows. "And generally wherever in a contract of sale it is stated that some precise fact is to be done by either party, this may amount to a condition, though not so expressed. As when in a contract for sale of goods the words are 'to be delivered on or before' a certain day, this is a condition precedent, and if they are not delivered on or before that day the purchaser is not bound to take the goods." And the principle is that if time appear, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent. (Benj. Sales, § 593; *Higgins v. Deleware, etc. R. R.* 60 N. Y. 553.)

It appears from finding numbered 5 that the items in the list of goods ordered as stated in a former finding of 175 pounds of long primer No. 11, and 150 of brier No. 13, were not filled or sent in the shipment of the goods sent, or at all, but that instead thereof the defendant sent in said shipment 176½ pounds of long primer and 151 pounds of brier of a different face from that ordered by plaintiff; that the order was made by reference to a specimen book furnished by the defendant containing samples of the type sold by it, and were in said order designated by numbers appearing on said book. Under these facts the plaintiff was not bound to accept goods differing from the samples appearing in the book furnished it, and from which the selections were made.

Whether the samples in the book furnished by the defendant from which the selections were made rendered this transaction a sale by sample, it is unnecessary to consider for the reason that the plaintiff had the right to repudiate the transaction and to refuse to accept the goods if they were not what it ordered; but the appellant contended on this point that the transaction was divisible, and while the plaintiff was not bound to accept any goods

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which it did not order, it was bound to accept and pay for such as were ordered by it.

The consideration was entire, and the merchandise ordered was a printing outfit for a country newspaper. This outfit was composed of a vast number of items, each one having a separate value, but the fact that they did consist of separate items and valuations could hardly be regarded as decisive. Was the type such an essential part of the outfit that a change in its face or style from that ordered would materially affect the outfit? We think it would. A publisher has a right to determine for himself what style of type shall fill his columns, and the manufacturer must content himself by furnishing such as are ordered. In this case the plaintiff may have been unwilling to issue a paper printed on such type as the defendant selected. In such case it was not bound to accept a part of the outfit and then undertake to procure in other markets such a type as it had ordered. Such a course would impose additional expense, risk and delays upon it which it was not bound to incur or assume.

The defendant encounters another difficulty in its endeavor to compel the plaintiff to accept these goods. The plaintiff had the right to examine and inspect the goods before it could be required to accept and pay for the same. It is elementary law that in offering delivery the vendor is bound to give the buyer an opportunity of examining the goods, so that the latter may satisfy himself whether they are in accordance with the contract. (2 Benj. Sales, § 1042; *Croninger v. Crocker*, 62 N. Y. 151.) Under the findings in this case, the plaintiff never had the opportunity to inspect said goods. The invoices were delivered, and Messrs. Flanagan & Bennett offered to deliver the bills of lading on payment of the draft, but this being refused, nothing further was done.

A careful examination of the record fails to disclose

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any error in the judgment appealed from, and the same must therefore be affirmed.

[Filed February 22, 1892.]

E. W. CARVER v. JACKSON COUNTY.

APPEALS—SPECIFICATION OF ERRORS.—The general rule is that the notice of appeal in actions at law must specify with reasonable certainty the grounds of error upon which the appellant intends to rely; but objections to the jurisdiction of the court below over the subject matter, and that the facts stated in the complaint do not constitute a cause of action, may be raised for the first time in the supreme court whether specified in the notice of appeal or not.

Jackson county: L. R. WEBSTER, Judge.

Plaintiff appeals. Affirmed.

This is a proceeding by writ of review to reverse the action of the county court of Jackson county in the matter of laying out a public road in said county. The court below dismissed the writ and rendered judgment against the plaintiff for costs, from which this appeal was taken.

The notice of appeal is addressed to Jackson county and to Wm. M. Colvig, district attorney, and, omitting the title, is as follows:

"You and each of you are hereby notified that the above named plaintiff E. W. Carver hereby appeals from the decision and judgment rendered in the above named court in the above named cause on the twenty-ninth day of March, 1891, dismissing the writ of review and rendering a judgment against said plaintiff for the costs of said proceeding, to the supreme court of the state of Oregon, and from the whole of said judgment and decision.

"H. K. HANNA, and

"C. W. KAHLER,

"Attorneys for Plaintiff."

H. K. Hanna, for Appellant.

Wm. M. Colvig, for Respondent.

Opinion of the court—STRAHAN, C. J.

STRAHAN, C. J.—Upon the argument in this court, counsel for the respondent objected to the consideration of any of the supposed errors in the record because the same were not assigned in the notice of appeal.

Section 537, Hill's Code, among other things, provides in case the judgment be one rendered in an action at law, the notice of appeal shall specify with reasonable certainty the grounds of error upon which the appellant intends to rely upon the appeal; and section 544 authorizes this court to affirm, reverse or modify the judgment or decree appealed from in the respect mentioned in the notice, and not otherwise.

These provisions of the code, according to the plain import of the language, require that in an action at law the notice of appeal to this court must specify the grounds of error upon which the appellant intends to rely, and such has generally been the interpretation placed upon them by this court. (*Dolph v. Nickum*, 2 Or. 202; *Fulton v. Earhart*, 4 Or. 61; *Lewis v. Lewis*, 4 Or. 209; *Williams v. Gallick*, 11 Or. 337; *Krewson v. Purdom*, 13 Or. 563.) But an exception to this rule was stated and recognized in this court for the first time in *McKay v. Freeman*, 6 Or. 449. In that case the court said: "Before examining the assignment of error set out in the notice of appeal, it is necessary for us to pass upon the objections made for the first time in this court to the sufficiency of the complaint and to the jurisdiction of the court below over the subject matter of the action. It has been the practice of this court to consider that the court below had not jurisdiction of the subject matter and that the complaint does not state facts sufficient to constitute a cause of action or suit, whether they are assigned as error in the notice of appeal or not." And this seems to have been followed in *State v. McKinnon*, 8 Or. 487. The reason of this exception was not stated, but no doubt it is that in a case where the court below was without jurisdiction or where it acted upon a pleading which was utterly destitute

Opinion of the court—BEAN, J.

of legal merit, that is, which entirely failed to state a cause of action or defense, the court was without power to render a judgment that would be of any validity, and therefore rather than encumber its records with nullities in the form of void judgments the court would of its own motion take notice of the objection though not assigned as error in the notice of appeal.

This case is not within the exception above referred to, and it is difficult to see how we can examine the supposed errors without disregarding the plain mandate of the statute. *Woodruff v. Douglas Co.* 17 Or. 314, was found by the court to be within the exception and, properly understood, is in harmony with the other cases on the subject.

These suggestions lead to an affirmance of the judgment, and it is so ordered.

[Filed February 29, 1892.]

B. VANDUSEN ET AL. v. C. W. SHIVELY.

EVIDENCE—BOUNDARIES—COURSES AND DISTANCES—MONUMENTS.—The location of a disputed boundary is a question of fact to be determined from the evidence, wherein the object is to follow in the "footsteps of the surveyor" who established the original line; and, in so doing, courses and distances must yield to monuments, such as marks and blazes on trees and other like indicia of the line.

Clatsop county: F. J. TAYLOR, Judge.

Defendant appeals. Reversed.

Sidney Dell, for Appellant.

J. Q. A. Bowlby, for Respondent.

BEAN, J.—This is a suit to establish the west line of the donation claim of John M. Shively, in Clatsop county. The real controversy in the case is the true location of the southwest corner of the claim. Plaintiffs claim this corner to be identical with the northwest corner of the donation claim of H. S. Aiken, as established by the government surveyor in 1859, while defendant claims the corner to be

23	64
25	587
29*	76
30*	539
22	64
30	474
22	64
42	249
42	624
23	64
44	28

one hundred and forty feet west of the supposed Aiken corner. The Shively claim was located in 1844, and the boundary lines thereof surveyed and marked on the ground by a private surveyor. After the passage of the donation law, to wit, in 1856, the claim was surveyed by John Trutch, a government surveyor, and the corners established, but the southwest corner, as fixed by him, seems to have become obliterated and lost, so that it cannot now be found. In 1857 the McClure and Cook claims, which adjoin Shively's claim on the west, were surveyed, the field-notes of which call for the west line of Shively's claim as the east line of these claims. In 1859 the Aiken claim, adjoining Shively on the south, was surveyed. The field-notes of this claim show that the southwest corner of the Shively claim, as established by Trutch, is the northwest corner of this claim, and its north line is the south line of the Shively claim. In making the survey of the Aiken claim it seems that the southwest corner of the Shively claim as established by Trutch was not found by the surveyor, but a new stake was set by him at the point he supposed to be the true location of the corner. It is from this stake plaintiffs contend the true line in dispute should commence and be extended north to the admitted northwest corner of the Shively claim.

The line as actually run on the ground by Trutch, if it can be ascertained, is the line which must govern in this case, and courses and distances, as given in the field-notes, must yield thereto. (*Goodman v. Myrick*, 5 Or. 65.) The location of this line is a question of fact to be ascertained from the evidence. The courses and distances as given in the field-notes are but descriptions which serve to assist in determining where the line was actually run. But where the line can be shown from the marks and blazes on the trees or other natural monuments or calls, the courses and distances must yield to it. In cases of this kind, the object

Opinion of the court—BEAN, J.

is to follow in the "footsteps of the surveyor" as nearly as possible. No fixed or certain rules can be laid down by which questions of disputed boundaries can be settled, but each case must depend upon its own particular facts. The courses and distances in this case are entitled to but little weight in determining the line in dispute, as they do not correspond with the line as claimed by either party.

The evidence is not at all satisfactory, owing in part to the lapse of time since the claim was surveyed, the changes that have taken place in the surface of the country, the destruction of the witness-trees at the southwest corner, and the destruction of many of the marked trees along the line; so that we can only hope to approximate a correct result. From an examination of the evidence, it seems to us the line claimed by defendant is shown by a preponderance of the evidence to be the one actually run by Trutch, and therefore the true location of the line in dispute. It is identified by J. M. Shively as the line run by him in 1844, when he surveyed the claim for O'Neil, and the evidence shows that Trutch followed this line in making his survey. It substantially agrees with the natural calls in the Trutch field-notes, especially the crossing of the two creeks, while none of these calls is found on the line as claimed by plaintiffs.

It is distinctly traceable on the ground, according to the evidence, by the marks and blazes on the trees, and substantially agrees with the reputed claim line as evidenced by the fence between Brown & Stevens and the fence of Flavel. It intersects the northwest corner of block 56, Shively's Astoria, as laid out and platted in 1844, as shown on the plat; while the line claimed by plaintiff is about fifty feet east. The evidence indicates that it intersects the southeast corner of the McClure claim and crosses the section line at or near the point called for in the field-notes, while plaintiffs' line crosses the section line some sixty feet farther east. These, and other facts not necessary to state,

Opinion of the court—BEAN, J.

impel us to the conclusion that on the evidence before us, the line as contended for by defendant must prevail.

The plaintiffs' contention is supported only by the fact that what they claim to be the southwest corner of the Shively claim is the northwest corner of the Aiken claim as located in 1859, and which was intended to be identical with the true southwest corner of the Shively claim, and is within six feet of the correct distance from the southeast corner of the Shively claim according to the field-notes. This corner was established or located about three years after the Shively claim was surveyed, and of course cannot prevail over the true corner of that claim, when ascertained. That it is located at the correct distance from the southeast corner of the Shively claim is a circumstance in plaintiffs' favor, but not a controlling one, when it is considered that none of the government calls are found on the line extended from this point to the northwest corner of the Shively claim, nor does it bear the correct course or distance; and, according to the statement of defendant's counsel, it would, if adopted, "cut off ten of the patent number of acres" from the Shively claim.

It follows that the decree of the court below must be reversed and the cause remanded with directions to appoint a commission to mark upon the grounds with proper monuments the west line of the Shively claim, commenceing at the northwest corner of the claim, and running thence in a straight line to a point one hundred and forty feet west of the stone monument set for the southwest corner of the claim by the commissioners appointed by that court in this suit.

Statement of the case.

[Filed February 29, 1892.]

GIDEON F. HODSON v. J. C. GOODALE.

CONVERSION—CHATTELS SEVERED FROM REALTY—TITLE TO LAND—PAROL TESTIMONY.—In an action for the conversion of chattels, the ownership of which depends upon the fact that they have been severed from the land of plaintiff, the title to the land is only collateral to the main fact in dispute, and may be proven by parol.

CONFUSION OF GOODS—PARTITION OF CHATTELS.—Where the owners of different lots of logs voluntarily commingled them in a stream at a point where there is no market for them, and where they cannot be separated, it is necessarily an incident to the voluntary commingling that any one or more of the owners, upon notice to the others, may at the common expense of all in proportion to their holdings, move the logs to some point where separation may be conveniently possible.

Lane county: M. L. PIPES, Judge.

Defendant appeals. Affirmed.

The complaint alleges in substance that the plaintiff was on the fourteenth day of March, 1890, the owner and in the possession in Lane county, Oregon, of 1,300,000 feet of good merchantable saw logs, branded as follows, to-wit, about 700,000 with the figure "7," and about 600,000 feet with the figure "2," and that said logs were of the value of \$4.50 per thousand feet, and of the aggregate value of \$5,850; that on said fourteenth day of March, 1890, defendant wrongfully and unlawfully, and without plaintiff's consent, took said logs into his possession in said Lane county and converted the same to his own use, to plaintiff's damage in the sum of \$5,850; that on the twentieth day of March, 1890, plaintiff demanded possession of said logs from the defendant; that defendant claimed to be the owner thereof, and failed, neglected and refused to deliver the same or any part thereof to plaintiff, and still withholds the same from the plaintiff, to his damage in the sum of \$5,850, with interest at the rate of eight per cent per annum since the fourteenth day of March, 1890.

The answer denies each material allegation of the com-

Opinion of the court—STRAHAN, C. J.

plaint, and then alleges certain matters in the nature of an estoppel *en pais*.

The reply denied the new matter in the answer.

A trial before a jury resulted in a verdict for the plaintiff in the sum of \$2,080, on which judgment was duly entered, from which this appeal was taken. Thirty-four assignments of error are made in the notice of appeal, but only such as are necessary to a proper disposition of the cause will be noticed in the opinion.

W. W. Thayer, and A. E. Gallagher, for Appellant.

L. Bilyeu, and Geo. A. Dorris, for Respondent.

STRAHAN, C. J.—An objection was made in the court below and argued here upon an exception to the competency of the evidence offered on the part of the plaintiff to prove title to the logs in controversy. The evidence on the part of the plaintiff on this subject was to the effect that plaintiff and one Harrill made a contract, by the terms of which plaintiff was to furnish the timber, provision the camp, pay the hands and other expenses, and Harrill was to superintend the cutting of the logs and putting them in the river, and was to have the privilege of purchasing them from the plaintiff for fifty cents per thousand feet, and Harrill was to reimburse the plaintiff for all sums so expended, with ten per cent interest thereon. By the terms of the contract, the logs were to be and remain the property of the plaintiff, and to be in his possession and under his control until Harrill should buy and pay for them, which he might do at any time before the close of the season for running logs. The evidence further tended to prove that all the logs in controversy were branded "7" and "2," and were cut under this contract partly on the plaintiff's land and partly on the land of E. Banty from timber purchased of him by plaintiff; that the logs were cut by and under the direction of Harrill and one Striker, who was his partner in the logging business, and

Opinion of the court—STRAHAN, C. J.

who became a partner with Harrill in this contract after the making of the same; that plaintiff furnished all the timber and paid all the expenses for running the camp, cutting and putting in the logs, etc.; that on the fourth day of February, 1890, all the "7" and "2" logs but a few which were in the Mohawk river and within one and a half miles at the farthest from plaintiff's land, were in the river or banked on plaintiff's land, and all of them were in his possession and owned by him; that there were about six million feet of other logs in the river; that plaintiff's logs were put in the river and were behind all the other logs; that there were fourteen different brands of logs in the river, owned by other parties; that all the brands had been put in indiscriminately and mixed and commingled by common consent of the parties who owned them; that about one-half of the logs in the river had been run by Harrill and Striker to or near the mouth of the Mohawk river, and that they were engaged on those branded "2" and "7," and running them with all the other logs in the river, when on the fourth day of February, 1890, high water carried a great many of the lower logs out of the Mohawk; that on that day, and before the plaintiff's logs had been moved by the high water, Harrill and Striker went to the plaintiff and informed him that owing to their loss at the mouth of the river they would be unable to purchase the 7's and 2's under their contract, and that they would do no more work on that river, and advised the plaintiff to take steps to secure his logs against the high water, which plaintiff did at once attempt to do. But on that night they were carried about four miles down the river with other logs where they were lodged in a jam, in which were lodged in all about four million feet of all the different brands in the river; that the upper part of the jam consisted of about 400,000 feet, nearly all being branded "7" and "2"; that only a part of the "7" and "2" brands got out of the Mo-

Opinion of the court—STRAHAN, C. J.

hawk, and they were in the McKenzie and Willamette rivers.

The evidence on the part of the plaintiff, and given by the plaintiff on his own behalf, tended to prove that he was the owner and in possession of the land on which the logs were cut, and he claimed to be the owner of the logs because he was the owner of the land and in possession thereof, and because he had made a contract with Harrill and Striker for cutting the logs on the land, and he had never parted with their possession until they were taken by the defendant.

The defendant's exception is that it is not competent to prove title to land by oral evidence; but the exception can not be sustained because the inquiry as to the title to the land is only collateral. It is not the main fact in dispute, and it is only proven as a fact tending to show title in the logs after they were severed from the realty. In this and many other similar cases arising constantly in practice, oral evidence of the fact and of the possession of the realty from which the chattel was severed is received, and rarely objected to. Besides this, the evidence went to the jury without objection, and the exception was to the refusal of the court to withdraw it. But that does not change the force of the objection in this case. We place the decision on the ground that this evidence was competent for the purpose for which it was offered. But the appellant's counsel insist that plaintiff's evidence did not go far enough to establish his possession. It is not perceived how this contention can be sustained. Plaintiff testified that he was in possession of the land and the logs. This presented a question of fact upon which the jury was compelled to pass. The defendant might have pressed the inquiry further and ascertained in what manner the plaintiff was in possession, that is, whether he was actually in possession by occupying the land, or whether it was such possession as the law declares follows the legal title; but this he

Opinion of the court—STRAHAN, C. J.

did not do, and this court is unable to indulge in any conjectures on the subject in the present condition of the record before us. There was evidence on the point which was competent, and that is sufficient.

The plaintiff's counsel asked him: "How many of the figure '7' were put into the river?" To which the defendant objected but the objection was not allowed, and an exception taken, and the witness answered, "About 836,000 feet." The same question was asked about the 2's, with the same objection and exception, and the witness answered: "About 700,000 feet." There was a dispute as to the quantity of logs the plaintiff had in the river and the quantity of plaintiff's logs that came into defendant's possession; and we think this evidence relevant and competent on those questions. The same may be said as to the question asked Oscar Parsons as to the number of logs, 2's and 7's, put in the Mohawk river when the defendant took them. This evidence was not direct and probably not satisfactory in itself, but it contained some facts which would necessarily enter into the deliberations of the jury, and could be used by them in connection with the other evidence in the case in computing the plaintiff's interest in the jam and the proportion of the 2's and 7's taken by the defendant.

The plaintiff's counsel asked him: "Did you get any money from any body to run the camp?" Also the following: "Now, are there any expenses for putting in those logs that have not been paid yet?" Each of these questions was objected to; and the objections being overruled, an exception was taken, and the witness answered each question affirmatively. The facts sought to be elicited by these questions have no direct bearing upon the questions at issue; but the questions were evidently asked for the purpose of amplifying the facts already in evidence by the plaintiff without objection; that his contract with Harrill obliged him to advance the money to pay the expenses

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of running the logging camp and for putting the logs into the river. This evidence was intended to show more specifically and with greater particularity the fact that the plaintiff did perform this part of his agreement with Harrill. Inasmuch as the defendant claims title to the logs through Harrill and Striker, it became necessary for the plaintiff to prove what contract he had with them, for the purpose of showing to the jury that they had derived no title to the logs through him. In this way the plaintiff might get some immaterial evidence before the jury, because it was so connected with other questions that were material that they could not be separated, but such evidence could do the defendant no injury, and it would be a refinement of technicality not to be thought of to reverse a judgment upon such an exception.

The plaintiff's counsel asked the witness Oscar Parsons the following question: "From what you saw in your trips down the river, how many of those logs, figures "2" and "7," went to Corvallis and Harrisburg?" This question was objected to; and the same being overruled, an exception was taken, and the witness answered, "About one million feet." This question was asked on re-direct examination. The witness had previously testified, without objection, that he was a logger; had logged seven years on the Mohawk river; that he had helped run all the logs in the Mohawk for Harrill and Striker, and was their foreman, and knew the exact location of all the logs after the flood, and when the defendant took them; that the defendant took all the logs left in the Mohawk river after the flood that could be gotten out and driven down; that the defendant made two drives and cleared them all up that he could get; that witness worked for the defendant on both of these drives; helped break the jam and run the logs to Coburg, Harrisburg, and Corvallis, where the defendant used or sold them. All the fourteen brands in the river were put in and run indiscriminately, no effort being made

Opinion of the court—STRAHAN, C. J.

to separate them. They were all being run by Harrill and Striker when the flood came, and were mingled together by them. In view of this evidence the plaintiff was properly allowed the answer to the question under consideration. The material issue was the quantity of these logs used by the defendant, and this question and answer, when taken in connection with the preceding part of the evidence of this witness, had a direct bearing upon that question.

On the cross-examination of this witness, the defendant's counsel asked him this question: "What would be the value of the logs, 2's and 7's, if you were to buy them as they were in these jams at the time the defendant took them and take them mixed up with the other logs of the defendant's there, without the right, in running them, to interfere with the defendant's logs or to run them altogether otherwise than at the owner's expense?" This question was objected to by the plaintiff, which objection was sustained by the court and an exception taken. The defendant's counsel stated to the court that he expected the witness to answer that these logs, 7's and 2's, would not be worth anything if taken mixed up with those other logs, for the reason that to separate them and run them separately would cost more than the logs were worth, and for the reason that to run so many of the other brands as would be necessary to cause a separation of the 7's and 2's from them, or to run them together at the purchaser's own expense, would also cost more than they were worth. The question is unnecessarily prolix and its meaning is not obvious, and the facts which counsel expected to elicit by the answer consist almost entirely of an argument, the obvious purpose of which was to show that the logs were of no value. It must be remembered that the evidence in the case tended to show that these logs in the river were mingled together by the owners of the various brands by mutual consent. It does not appear to us under such circumstances if the expense of separating was so great in

Opinion of the court—STRAHAN, C. J.

that small river, or in the jam where they were lodged, that any one or more of such owners was bound to separate his logs from the others before proceeding to run his own logs. There was no market there for the logs, and it probably was impossible to separate them in such a small stream; but if they could not be separated there they could be driven down the stream to some point where separation was possible and convenient; and if that was the cheapest and best mode of doing it, then any one or more owners of the logs, upon notice to the other owners, had the right to pursue that course with them and to compel all the other owners who did not aid or participate in the run to contribute his proportion of the reasonable expenses of running the same. This is a necessary incident of the consent to mingle together, and each owner must be held to have impliedly consented to mingle his logs with the others in the river. This must be so, or else one contrary owner has it in his power to virtually confiscate all the logs thus mingled by refusing his consent to permit his logs to be driven with the others. No such consequence as this was intended by any of the common owners, and is not to be gathered either from their acts or words. The same reasoning is applicable to the other question asked Oscar Parsons. The defendant also contends that these questions and the answers expected presented a question as to the correct measure of damages, but that question will be considered in connection with the court's charge on that subject.

On the subject of the measure of damages, the court instructed the jury as follows: "And then you must find out what those logs were worth, when and where the defendant took them, if he took them. There is testimony tending to show that he took them up the Mohawk river. There is some evidence tending to show what the logs were worth at the mouth of the Mohawk river (that kind, character and quality of logs), and that too when the logs were away from the market some distance. You will find from the evidence

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the market value at the nearest market, the nearest convenient market, and then you will find from the evidence what it cost to take the logs from where they were to that place, and deduct that from the value of the logs at that place; and when you have found that, that is the amount you are to find for the plaintiff." On the same subject the defendant requested the following instruction: "You will then ascertain from the evidence the value of the number of these logs which defendant took and converted, and in estimating that value you will find what those logs would sell for as they were in the condition and at the time in which the defendant took them, mixed up there as they were with all the other logs, and the purchaser to take his chances of getting them out of there at his own costs, and of getting any pay from the owners of the other logs for any work done on those other logs, except what the owners of those other logs might agree to pay the purchaser therefor."

There are some discrepancies in the authorities as to what is the measure of damages in an action of trover, though the general rule undoubtedly is the value of the property at the time the same was converted, with interest from the time of such conversion. The defendant seems to concede this to be the correct rule, but his contention is as to the time and place of conversion, and much of his evidence upon the trial was directed to the condition of the logs as they were in Mohawk river; but we have already held that any one of the owners of these logs might move them down the river to some place where they could be conveniently separated, and that by so doing he committed no wrong. It would result from this, therefore, that the defendant's acts in moving the logs down the river to a point where they could have been easily separated, was the exercise of a rightful dominion over them and not a wrong of which the plaintiff could complain.

Argument of counsel.

The defendant's acts only became wrongful when he carried the logs beyond that place. But in addition to this it appears there was no market for logs in Mohawk river in the condition these were in. In such case their value would be determined by the nearest and most convenient market, deducting the cost of their transportation and delivery at that place. The justice of this principle commends it to our favorable consideration, and the right to deduct the expense was practically applied in *McLean Co. Coal Co. v. Long*, 81 Ill. 350; *Hill v. Canfield*, 56 Pa. St. 454.

Finding no error in the judgment appealed from, the same must be affirmed.

[Filed February 29, 1892.]

W. L. VANCE ET AL. v. FRANK WOOD.

EJECTMENT — ADVERSE HOLDING — PRIVACY OF POSSESSION — EVIDENCE.—In actions of ejectment where the defense relied upon is adverse possession for the statutory period of limitations, made up of several hostile holdings, each less than the requisite time, it is incumbent on the defendant to establish privacy of possession in the successive occupants under whom he claims; but such privacy may rest in deed or in parol.

Benton county: M. L. PIPES, Judge.

Plaintiff appeals. Affirmed.

J. R. Bryson, and Charles E. Wolverton, for Appellants.

Where different persons enter upon land in succession, without title, the last possessor cannot tack the possession of his predecessors to his own, so as to make out continuity of possession, sufficient to bar the entry of the owner. The possession of one cannot be the possession of the other, because the moment the first occupant quits the possession, the legal possession is restored, and the entry of the next occupant constitutes him a new disseisor. There is no privacy between them. (*Armstrong v. Resteau's Lessee*, 5 Md. 274; 59 Am. Dec. 115.)

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29*	73
33*	405
22	77
29	302
22	77
33	434
22	77
41	614

Argument of counsel.

To sustain separate successive disseisins as constituting a continuous possession, and confirming a title upon the last disseisor, there must have been a privity of estate between the several successive disseisors. To create such privity, there must have existed, as between the different disseisors in regard to the estate of which a title by disseisin is claimed, some such relation as that of ancestor and heir, grantor and grantee, or deviser and devisee. In such cases the title acquired by disseisin passes by descent, deed or devise. (*Sawyer v. Kendall*, 64 Mass. 244; *Melvin v. Proprietors, etc.* 46 Mass. 32; 38 Am. Dec. 384; *Marr v. Gilliam*, 1 Coldw. 504; *San Francisco v. Fulde*, 37 Cal. 352; 99 Am. Dec. 278.)

Where one occupant enters after another, it must be with the consent of his predecessor, indicated by contract or by an act of the law passing the possession from one to another, in order to make a continuous adverse possession. (*Chouquette v. Barada*, 23 Mo. 336; *Shaw v. Nicholay*, 30 Mo. 99; *Shuffleton v. Nelson*, 2 Saw. 545.)

When a party purchases realty and takes deed with given boundaries, but occupies outside the limits expressed in the deed; then deeds by the same description to a third party, who occupies outside such limits, the holding of the two grantees cannot be tacked so as to make their joint occupancy of the premises outside of description in deeds continuous. (*Graeven v. Davies*, 68 Wis. 317; *Erck v. Church*, 87 Tenn. 575; *Ruffin v. Overby*, 105 N. C. 78; *Jenkins v. Trager*, 40 Fed. Rep. 726.)

Where a disseisor conveys part of the land, and the grantee, under color of the deed, enters upon the whole, the possession of the first disseisor will not avail the grantee, in regard to the part not embraced by the deed. (*Ward v. Bartholemew*, 23 Mass. 408.)

Appellants claim that the court erred in allowing and permitting the Wood affidavit for continuance to be read in evidence at the trial over the objections of appellants. An affidavit for postponement of trial should state the

Argument of counsel.

evidence which the moving party expects to obtain. (Hill's Code, 284.)

W. S. McFadden, John Kelsay, and J. J. Whitney, for Respondent.

A party claiming title by adverse possession must prove it. (Sackett Instructions, 126; 1 Am. & Eng. Enc. Law, 303; *Hubbard v. Kiddo*, 87 Ill. 578.)

Adverse possession depends upon the intention under which the land was taken and held. (1 Am. & Eng. Enc. Law, 227; 1 Thomp. Trials, §§ 1407, 1410; *Woods Lim.* 507, 513.)

In all cases if a person under a mistake as to the boundaries enter and occupy land not embraced in his title, claiming it as his own for the requisite statutory period, he thereby becomes invested with the title thereto by possession, although his entry and possession may have been founded upon a mistake. (*Woods Lim.* § 263; *Parker v. Metzger*, 12 Or. 407; 1 Am. & Eng. Enc. Law. 281; *Vandall v. St. Martin*, 42 Minn. 163.)

If there be several adverse occupants, the last one may tack the possession of his predecessor to his, so as to make a continuous adverse possession for the period required by the statute, provided there is a privity of possession between such occupants. (*Shuffleton v. Nelson*, 2 Saw. 540; *Haynes v. Boardman*, 119 Mass. 414; *San Francisco v. Fulde*, 37 Cal. 352; 99 Am. Dec. 278; *Innis v. Miller*, 10 Martin, 289; 13 Am. Dec. 330.)

Such tacking, continuity and connection may be effected by any conveyance, agreement, or understanding which has for its object a transfer of the rights of the possessor or of his possession, and is accompanied by a transfer of possession in fact. (*Weber v. Anderson*, 73 Ill. 439; *Kruse v. Wilson*, 79 Ill. 233; *Zeilin v. Rogers*, 21 Fed. Rep. 103; *Swift v. Mulkey*, 14 Or. 59; *Sherin v. Brackett*, 36 Minn. 152; *Fuloon v. Simshauser*, 130 Ill. 649.)

It was the province of the jury to ascertain from the

Opinion of the Court—LORD, J.

evidence the facts as to the confines or lines of this land in dispute, and the jury had the right to consider both the natural and artificial boundary marking this land to ascertain the same. (1 Bouv. Dict. 218; Woods Lim. 515; *Brumagim v. Bradshaw*, 39 Cal. 24.)

To entitle an instruction to be given, it must be wholly correct in point of law, as well as applicable to the facts in evidence in the particular case. (*Grand Trunk R. Co. v. Latham*, 63 Me. 177; *Roberts v. Parrish*, 17 Or. 583.)

So when an instruction asked cannot be given without being modified, the court should refuse to give it; besides it is always proper to refuse instructions which would more likely mislead than instruct the jury. (*Hodges v. Cooper*, 43 N. Y. 216; *Garlick v. Bowers*, 66 Cal. 122; *Dwyer v. Bassett*, 63 Tex. 275.)

LORD, J.—This is an action in ejectment brought by the plaintiffs against the defendant to recover the possession of certain lands described in the complaint.

The answer denies all the material matters alleged except the possession of the defendant, and for a separate answer alleges: "That neither of said plaintiffs, nor any ancestor, predecessor or grantor of either of them was seized or possessed of any part of said lands within ten years next before the commencement of said action." And "that defendant and his grantors were for more than thirteen years immediately before the commencement of said action in the visible, open, notorious, uninterrupted, and exclusive possession of the whole and every part of said lands under a claim of right thereto, and also, under color of title by deed, claiming to own the whole and every part of the same in fee simple, adversely to each and both of said plaintiffs."

The reply puts in issue all the material allegations of the separate defenses. Issue being thus joined, a trial was had, which resulted in a verdict and judgment in favor of the defendant. From this judgment the plaintiffs appeal to

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this court, and specify several errors upon which they rely for its reversal. These alleged errors consist of objections to the admission of certain evidence introduced by the defendant, and exceptions to certain instructions given, and to certain instructions refused by the trial court. With one exception, all of these objections and exceptions involve the same principle of law, and to better understand them, some statement of the evidence is necessary. The evidence shows that in January, 1877, R. M. Webster purchased from Johannes Thomas, for a certain money consideration, a tract of land, which he represented and Webster understood included the land in dispute as a part of it; that the tract in the deed executed to Webster is described by metes and bounds and contains two hundred and three acres, and that the land in dispute at the time of such sale was understood to be included within this description and number of acres, when in fact it was without the description and in excess of that number of acres; that the land was not sold nor bought by the acre, but as a tract, and as a part of such tract included the land in dispute; that Webster could not have made the purchase without including the land in dispute, as Thomas refused to sell the tract unless Webster would take to the center of the lake as his south line, which embraced the land in dispute; that Webster went into possession of the whole tract, including the land in question, and remained in actual possession of the whole until the year 1884, or about seven years, when he sold the same tract for a valuable consideration to one Volle; that the transaction in respect to Volle shows that Webster represented and understood at the time of the sale that the land in dispute was included in the tract which he sold to Volle, and that Volle understood when he purchased the tract that the land in question was included as a part of it; that the land was sold by the tract and not by the acre, and that the deed executed by Webster to Volle, in pursuance

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of their understanding, contained the same description and number of acres as did the deed of Thomas to Webster, and did not include the land in dispute as the partners supposed that it did; that Volle went into possession of the whole tract, including the land in dispute, and so remained in possession of it, until the year 1889, or about five years. Upon these facts no question is raised but that both Webster and Volle were in the actual possession of the land in dispute during the respective periods already mentioned, nor that the defense of adverse possession under the statute of limitation is well maintained, if there exist a privity between Webster and Volle as the successive holders in relation to the land in controversy.

The point of contention for the plaintiffs is, that the court, in the admission of the evidence, and in giving the instructions excepted to, proceeded upon the theory that only a transfer of a claim of right and possession by Webster to Volle was necessary to continue the running of the statute of limitation. As counsel for the plaintiffs proceeded to discuss the assignments of error in the reverse order in which they are stated in the bill of exceptions, we shall pursue the same order. Before, however, referring to the particular instructions by which it is claimed the trial court insufficiently defined or misapplied the doctrine of privity between successive adverse holders, it will be better to briefly review some preceding instructions to enable us to better understand the instructions specially criticised. The trial court after stating the issues and explaining adverse possession, among other things, charged the jury to the effect that there was no evidence to show that the defendant's grantors or predecessors ever had a color of title, or any conveyance in writing to the premises in controversy; that at the time of the sale of the land by Thomas to Webster, Thomas as a part of the transaction sold Webster the disputed tract, and that Webster went into the possession of the whole of it, but that by mistake of the par-

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ties, or surveyor, or both,* or all of them, the deed failed to include the land in dispute; that the evidence in this regard was admitted for the purpose of enabling the jury to determine the character of the entry and possession of Webster, and not to show that Thomas conveyed to Webster by deed any interest in the disputed tract; that land titles cannot be conveyed by parol, or otherwise than by deeds duly executed; that in the case of Volle, as to this disputed tract, in order to keep the statute running, there must be some privity between Webster and Volle, and that this involved another requisite of adverse possession, which is, that it must be continuous; that adverse possession must continue without interruption for ten years; that if one in adverse possession before the expiration of the ten years abandon his possession, the true owner becomes seized at once; and if another then make a hostile entry under a new claim of right, the statute begins to run anew, and the period of limitation would have to be estimated from the date of the new entry; that a person thus entering hostilely is a disseisor, and that two independent and successive disseisors cannot have their independent periods of possession tacked or joined together to make the full period of ten years.

We now come to the instructions to which the exceptions are taken, and as to which it is urged the doctrine of tacking as between successive adverse holders is not properly defined. The trial court said: "In this case the evidence tends to show that Webster's possession, if any, of the disputed tract, was only from 1877 to 1884, or about seven years, which was not long enough, even if adverse, to give him a title by adverse possession. And the same may be said of Volle, whose possession the evidence tends to show was from 1884 to 1889, or about five years. So that in order to constitute the full period, the time of Webster's possession must be added and joined to that of Volle, even if the two were adverse. In order to justify

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you in so adding them in estimating the period of ten years' adverse possession, if adverse, you must find from the evidence I have referred to about the transaction between Webster and Volle, that Webster held the adverse possession and transferred his adverse possession to Volle, and that Volle's entry was made, if made, not only under a claim of right, but under a claim of right received from Webster. Even if Volle went into possession at the very moment that Webster went out, the two periods cannot be joined unless privity exist between them. It is not the time between the periods of possession, but the relation of the successive occupants as to their privity that determines the question. You will find from the evidence whether that is the case; and if it was, then the two periods of possession of Webster and Volle, if adverse, may be both considered together in estimating the statutory period of limitation; otherwise not."

It is claimed that these instructions offer an insufficient and misleading definition of privity between successive adverse holders of real property, in this, that they disregard the element of contract necessary to be present to show privity between Webster and Volle as successive adverse holders of the land in dispute. But this is not so. The evidence showed that it was the tract of land including the land in dispute which the contract covered in the contemplation of the parties at each successive sale, although the description in their deeds did not embrace it.

By their agreements it was included, sold and bought as a part of the tract, but there is no pretense that there was any conveyance of it by deed. In a word, their deeds did not cover all the land that the parties had in mind and supposed they had sold when the respective sales were made; but their conduct in relation to the disputed tract indicates that it was taken possession of with the other land as a part of the consideration for such sales; that they entered upon and occupied the land, claiming it as their

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own, although not embraced in the description of their title. If the successive transfers of possession were made, as the evidence in fact indicates, it is plain that the court deemed it immaterial whether they were effected by a verbal or written agreement.

To establish privity of possession, the later occupant must enter under the prior one, and must obtain his possession either by purchase or deed. "Where the possession is actual," said DEADY, J., "it may commence in parol without deed or writing; and I am of the opinion, both upon reason and authority, that it may be transferred or pass from one occupant to another by a parol bargain and sale accompanied by delivery. All the law requires is continuity of possession, where it is actual." (*Shuffleton v. Nelson*, 2 Saw. 545.)

Unless the successive adverse possessions are connected by privity, the true owner is restored to his possession when the first occupant quits; and an entry afterwards by another wrongfully constitutes a new disseisin. But if such successive possessions are connected by any agreement or understanding which has for its object a transfer of the rights of the possessor, and is accompanied by a transfer of possession in fact, it is sufficient.

"Doubtless," said BUTLER, J., "the possession must be connected and continuous, so that the possession of the true owner shall not constructively intervene between them; but such continuity and connection may be effected by any conveyance or agreement or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of possession in fact." (*Smith v. Chapin*, 31 Conn. 531.)

In *McNeeley v. Langan*, 22 Ohio St. 32, the court says: "The mode adopted for the transfer of possession may give rise to questions between the parties to the transfer; but as respects the rights of third persons, against whom the possession is held adversely, it seems to us to be immaterial, if

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successive transfers of possession were in fact made, whether such transfers were effected by will, by deed, or by mere agreement, either written or verbal."

When it was shown that Webster obtained the possession of the land in dispute in 1877, and held possession of it, claiming it as his own, until 1884, at which time Volle obtained the possession of it, it became important to connect him with Webster in order to make a connected and continuous possession for ten years. The evidence upon this point has been stated. It shows that Volle entered into possession under an agreement or understanding which included the land in dispute. It is true, that agreement was verbal and that the conveyance which was executed in pursuance of it failed to embrace the land in dispute; nevertheless that agreement included it and established privity between Webster and Volle, so that it connected the successive adverse possessions of Webster and Volle. That contract was sufficient to convey Webster's possession, and, when accompanied by a transfer of possession in fact, it was sufficient to make their joint possession continuous. The bargain and sale was of the whole tract, including the part of it in controversy, which was omitted by mistake in the deed, but nevertheless there was a bargain and sale of it, accompanied by a delivery of possession, which suffices to establish privity of possession between such occupants. When the court in its instructions charged the jury that in order to connect the adverse possessions of Webster and Volle, they must find from the evidence that Webster had the adverse possession of the land in dispute and transferred it to Volle, and that Volle's possession was taken not simply under a claim of right, "but under a claim of right received from Webster," and that the two periods of their possession cannot be joined unless privity exists between them, it plainly meant, and especially in view of the preceding instructions and their explanatory phrases, that the jury must find from the evidence that their successive adverse

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possessions must be connected by some agreement or understanding between them, or else how is Volle's possession to be derived under a claim of right received from Webster, or how is any privity to exist between them, as stated in the instructions, upon the facts of the case, unless there was some understanding or agreement to create it?

What is the claim of right which Volle received from Webster but the possession of the land in dispute under the verbal agreement for the whole tract of which it was a part? It is true, the verbal agreement did not convey the title to such tract or any part of it, but it was sufficient to convey any possessory rights that Webster had to it, or any portion of it, and therefore was sufficient to transfer all his possessory rights to that portion of the tract not included in his deed, when accompanied by a transfer of possession in fact.

In view of the facts, it is impossible to construe or understand the instructions otherwise. The court did not proceed on the theory in the admission of the evidence, or in giving its instructions, or in refusing those asked by plaintiffs, that there must not be privity of possession between the occupants, or that there could be such privity without some agreement or understanding, written or verbal. Hence, there was no error in receiving such evidence, or in giving the instructions excepted to, or in refusing those asked, for they all involve the same contention as error.

As it seems to us, the vice of counsel's argument is, that they detach an isolated portion of the instructions, and by a purely verbal criticism seek to draw the inference from it, without regard to explanatory phrases or paragraphs, that the trial court disregarded the element of contract in applying the doctrine of privity between successive adverse holders of the possession of real property. Having reached this conclusion from the instruction, when they came to criticise or make their objection against the evidence, they seem to assume that the court ignored the element of contract in

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its admission necessary to create privity between Webster and Volle, as successive adverse holders of the land in dispute, but the facts are otherwise. The whole matter was submitted to the jury under instructions calculated to guide them rightly in the determination of the facts.

"In order to create the privity requisite to enable a subsequent occupant to tack to his possession that of a prior occupant, it is not necessary that there should be a conveyance in writing. It is sufficient if it be shown that the prior occupant transferred his possession to him, even though by parol." (Wood on Lim. § 271.)

The evidence shows that the land in dispute constitutes as much a part of the land bargained and sold as the part conveyed by deed; and although no title was conveyed to it, it was within the understanding of the parties, and possession of it was transferred. This was done by parol, and the instructions of the court properly cautioned the jury in regard to this particular.

We discover no error, and the judgment must be affirmed.

[Filed March 4, 1892.]

H. J. TEEL v. PEARL E. WINSTON ET AL.

ESTATES—FORECLOSURE OF MORTGAGE—DECEASED MORTGAGOR.—The death of a mortgagor and proceedings in the county court concerning the settlement of his estate do not prevent or suspend foreclosure of the mortgage. The only consequence of a failure to present the claim to the executor or administrator before bringing suit is, that a personal judgment cannot be rendered for a balance of the debt remaining unpaid after the security is exhausted. *Verdier v. Bigne*, 16 Or. 208, followed and approved.

Jackson county: L. R. WEBSTER, Judge.

Defendants appeal. Affirmed.

H. K. Hanna and *J. W. Hamilton*, for Appellants.

A. S. Hammond, for Respondent.

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BRAN, J.—This is a suit to foreclose a mortgage and for the sale of the mortgaged premises. The complaint avers in substance, that on October 24, 1890, U. L. Rice executed to John J. Strait his promissory note for two thousand one hundred and fifty dollars, due three years after date, with interest at ten per cent per annum, payable semi-annually, and if not so paid, the whole sum, both principal and interest, to become due and payable immediately at the option of the holder of the note. The note also provided for a reasonable attorney fee, in case of suit or action to collect the same. On the next day Rice executed to Strait a mortgage on certain real estate to secure the payment of this note. The mortgage contained the same provisions in regard to attorney fee and payment of interest as the note, and also contained the following provision: "It is also expressly understood, that if any sum made payable by the terms of said promissory note, or becoming due hereunder, shall remain unpaid for the period of ten days after same shall have become due and payable, then the party of the second part, his executors, administrators and assigns, may, at his or their option, declare the whole amount of said promissory note, with interest to date and attorney fee, to be at once due and payable, and may at once foreclose his mortgage and sell the premises as herein provided." The note and mortgage were on the same day, for a valuable consideration, assigned to plaintiff, and both the mortgage and the assignment were duly recorded in the proper office. On July 17, 1891, Rice died, leaving a will bequeathing all his property to Pearl Winston, and appointing defendant Brockway his executor. Brockway duly qualified as such executor, and letters testamentary were issued to him on April 10, 1891, and he has ever since continued to act as such. On April 15, 1891, plaintiff duly verified and filed his claim under said note and mortgage with the executor, and the same was duly allowed. On April 24, 1891, there became and was due upon said promissory note the sum of

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one hundred and seven dollars and fifty cents, as interest, according to the terms thereof, but nothing was or has been paid thereon. On May 6, 1891, more than ten days thereafter, plaintiff notified Brockway, as executor, that he declared and elected the whole sum of principal and interest to be due and payable. Thereafter, on May 16, 1891, this suit was commenced to foreclose the mortgage and for a decree for the sale of the mortgaged premises. A demurrer to the complaint having been overruled by the court below, defendants refused to plead or answer further, and a decree was entered in plaintiff's favor, from which defendants bring this appeal.

The contention of defendants on this appeal may be summarized as, first, the suit is prematurely brought, because six months had not expired from the granting of letters testamentary to Brockway; second, no claim for the accrued interest was ever presented to the executor for allowance or payment; and, third, it does not appear that the mortgage claim, or any part thereof, was ever disallowed by the executor.

In *Verdier v. Bigné*, 16 Or. 208, it was held by this court that the death of the mortgagor and the proceedings to administer his estate in the probate court, did not affect the lien of the mortgage or the right to foreclose such lien in the circuit court. The logical effect of this decision is, that the death of the mortgagor and the proceedings in the probate court do not change or suspend the remedy of the mortgagee to enforce his lien on the mortgaged lands, and as a consequence no presentation of the claim for allowance to the administrator or executor is necessary before bringing suit, nor does section 377, Hill's Code, have any application to proceedings of this kind. This doctrine seems to be amply supported, and the general rule is, that the failure to present to an executor or administrator for allowance a claim secured by mortgage, only operates to prevent a judgment for any deficiency that might

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remain after exhausting the mortgaged property, but does not affect the right to a foreclosure where no recovery is sought beyond the proceeds of the mortgaged lands. (Werner Law Admr. § 409; *Allen v. Moer*, 16 Iowa, 307; *Hill v. Townley*, 45 Minn. 167; *Scamman v. Ward*, 1 Wash. St. 179; *Reed v. Miller*, 1 Wash. St. 426; 5 Am. & Eng. Enc. Law, 213.)

In this case plaintiff is only seeking to enforce his lien against the mortgaged premises, and therefore there was no error in overruling the demurrer by the court below, and the decree is affirmed.

[Filed March 4, 1892.]

ANNE S. BURTON v. FRANK SEVERANCE ET AL.

EVIDENCE—DAMAGES—OPINION OF WITNESS.—The general rule of evidence is, that a witness must state facts, and not draw conclusions from them or give opinions; and hence, in actions for damages, while a witness may state the facts upon which the damages are predicated, he cannot give his opinion concerning the amount of damage resulting from any given act or omission, because it is the exclusive province of the jury to assess damages under the rules of law declared by the court.

APPEALS—SPECIFICATIONS OF ERROR.—The notice of appeal must specify the errors complained of with such certainty that the appellate court may see upon what grounds the ruling of the court below was based, otherwise the alleged errors will be disregarded.

Tillamook county: R. P. BOISE, Judge.

Defendants appeal. Reversed.

W. W. Thayer, and James McCain, for Appellants.

Raleigh Stott, and T. B. Handley, for Respondent.

LORD, J.—This is an action to recover damages for an alleged obstruction of Tillamook river. The plaintiff alleges in her complaint that she is the owner of certain lands adjacent to and abutting upon said river; that said river is a navigable stream in which the tide ebbs and flows regularly, and that she uses and enjoys her said lands by means

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37	73
22	91
140	19
22	91
42	236
22	91
45	109

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of said river, navigating the same in boats and scows from various parts of said land; that she also navigates and uses the waters of said river for the purpose of marketing wood cut from her said lands, for going to and from the county seat, postoffice and other places of business, and that the value of said lands is much enhanced by the facilities afforded by said river; that the defendants have, during a period therein named, obstructed said river by driving piles in the bed thereof, and erecting and maintaining a log boom across the same so as to stop the navigation thereof; that by means of said acts the plaintiff has, during a great part of the time, been prevented from using said river, either to pass to and from different parts of her lands, or to market wood or other products, or for ordinary purposes of travel, and that thereby she has been damaged in the sum of two hundred dollars, and that the value of said lands has been reduced, and that she has been damaged thereby in the sum of one thousand dollars; that she has been further damaged by obstructions to a tributary creek, etc.

The defendants answered, denying that said Tillamook river is navigable except to run sawlogs and float wood, or that plaintiff uses or enjoys her said lands by the means alleged, etc.; and deny the material allegations of the complaint, except as admitted in the second defense to the action. As such second defense, the defendants allege that on the eleventh day of May, 1889, the county court of Tillamook county, upon application duly made to it, under and in accordance with the provisions of the act of the legislature entitled, "An act authorizing the county courts of the several counties of the state to declare unnavigable streams highways for floating logs and timbers," etc., approved February 25, 1889, duly ordered and declared that part of said river, from the mouth of South Prairie slough to the headwaters thereof, which included the portion of said river where the alleged piles are driven and the said boom erected and maintained, to be a public highway for the

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floating and transportation of logs, timber and lumber; that thereafter and on the same day, the said county court duly entered into a contract with said Frank Severance, in pursuance of said act, leasing to him the use of said part of said river for the term of thirty years, to be used as such public highway, with the right to collect tolls, etc., and further alleged the execution of said lease, and a compliance with the terms thereof, and that said piles were driven and the boom maintained in accordance therewith and upon lands owned by the defendants.

The plaintiff's reply put in issue the new matter set up in the defense. The verdict and judgment went for the plaintiff.

The bill of exceptions shows that upon the trial the plaintiff offered herself as a witness, and that after testifying as to the alleged obstruction of said river, and as to the inconvenience and injury resulting therefrom, she was asked the following question: "How much were you damaged by reason of not being able to transport your hay by scows, and having to do it in the way you did?" This question defendants objected to on the ground that it was incompetent and called for the opinion of the witness. The court overruled the objection and defendants' counsel excepted. The witness answered, "Well it is hard to say; it took two boys and myself. We did not do anything else but just wait on stock. I do not know as I can say." Thereupon plaintiff's counsel asked this question: "How much have you been damaged on account of all the inconvenience and trouble that you have been put to in loss of time, labor, and so forth, by reason of this obstruction? How much have you been damaged in not being able to come to the postoffice and bring down your wood and your flour, and the general use of the river up to the time this suit was brought?" To these questions the defendants' counsel objected on the ground that the same were incompetent and called for the opinion of the witness. The court

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overruled the objection, and counsel for the defendants excepted, and then the witness answered, "Well, about thirteen hundred dollars, I think; that is what I think I ought to have." This exception constitutes the first ground of error upon which the defendants rely for a reversal of the judgment.

The general rule of evidence is, that a witness must state facts and not draw conclusions from them or give opinions. Our code provides that a witness can testify of those facts only of which he knows of his own knowledge, that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences or declarations of others are admissible. (Hill's Code, § 682.) The cases in which the opinions of witnesses are allowable constitute exceptions to the general rule. The opinion of a witness may be given respecting the identity or handwriting of a person when he has knowledge of the person or handwriting, or on a question of science, art, or trade, when he is skilled therein. (Hill's Code, Sub. 9, § 706.)

"As a rule," said ALLEN, J., "witnesses must state facts, and not draw conclusions or give opinions. It is the duty of the jury, or court, to draw conclusions from the evidence, and form opinions upon the facts proved. The cases in which opinions of witnesses are allowable, constitute exceptions to the general rule, and the exceptions are not to be extended so as to include new cases, except as necessity may require to prevent a failure of justice, and when better evidence cannot be had. On questions of science or trade, experts in the particular science or trade may give opinions. (1 Greenl. Ev. § 440; 1 Phil. Ev. 290.) On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown to be competent to speak upon the subject. He must have dealt in or have some knowledge of the article concerning which he speaks. Persons should be conversant

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with the particular article, and of its value in the market, as a farmer or dealer, or a person conversant with the article, as to the value of lands, cattle, produce, etc. These stand upon the general ground of peculiar skill and judgment in the matters about which opinions are sought." (*Terpenning v. Ins. Co.* 43 N. Y. 279; *Lincoln v. S. & S. R. R. Co.* 23 Wend. 433.) Nor is a witness allowed to give his opinion of the amount of damages resulting from any given act or omission. He must testify as to the facts, and will not be allowed to give his opinions founded on these facts, or the inferences which may be drawn from them.

"A witness," Mr. Sutherland says, "is not allowed to give his opinion of the amount of damages a party sustains from a given act or omission, because when he does so he includes the law as well as the fact. It is the province of the jury to assess the damages according to the rule of law, which it is the province of the court to lay down for their guidance; and witnesses are allowed only to furnish the data from which the amount is arrived at." (1 *Suth. Dam.* 794.) In *Morehouse v. Mathews*, 2 N. Y. 514, the witness was asked: "What damages accrued in consequence of feeding the cattle upon the hay in question instead of that agreed upon?" The defendant objected to the question on the ground that the witness could not give his opinion, but must give the facts. The objection was overruled, and the witness answered that he thought the damages would be fifty dollars. The court held that the evidence was improperly admitted, saying that "the witness should have been confined in his testimony to questions of fact, such as the number, condition, and value of the cattle kept by the defendant, the quality of hay used in comparison with that agreed for, the effect the poor hay produced upon the cattle, and thus have laid a foundation of facts from which the jury or justice could have formed an opinion of the amount of damages actually sustained." (*Clark v. Baird*, 9 N. Y. 183;

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Whitmore v. Bowman, 4 G. Greene, 148; *Evansville etc. R. Co. v. Fitzpatrick*, 10 Ind. 120.)

In the case at bar, the witness should have stated the facts—what she had seen and knew in respect to the matters in issue—and from those facts left the jury to draw the inferences, or form an opinion. It is clear the evidence was improperly admitted, for, as DARGAN, C. J., said: "I have not been able to find any case that holds the opinions of witnesses as to the *quantum* of damages resulting from any act, competent proof." (*M. & W. P. R. R. Co. v. Varner*, 19 Ala. 187.)

The bill of exceptions also show that after the plaintiff had rested her case, the defendants offered in proof of their defense the original petition to declare said Tillamook river a public highway between certain points, including the place where said boom was located, and the proceedings before the county court, including the lease or contract, alleged and referred to in the answer and set forth in the bill of exceptions, to the introduction of which plaintiff's counsel objected and the court sustained the objection, to which ruling the defendants' counsel excepted, and this constitutes the only other ground of error assigned in the notice of appeal. It does not appear from the record upon what grounds the trial court refused to allow the lease and other papers and proceedings to be given in evidence. The counsel for the defendants say that "the circuit judge did not undertake to hold that the act in question was invalid," that is, the act authorizing the county courts of the several counties of this state to declare unnavigable streams highways for the floating of logs, timber, etc., under which the defendants claim to have proceeded. If this be so, we shall certainly not undertake to pass upon so important a question, when no question of that character is raised in the court below, nor any specific ground of error assigned for the ruling. All that appears in the notice of appeal, or in the bill of exceptions, is that the court erred in sustaining

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the objection to the admission of the evidence. In such case it has been the constant practice of this court to hold that the appellant must specify the error complained of, otherwise to refuse to consider it. Innumerable objections may be suggested to come within the range of a general objection, and especially so in a case like this, and none of them be the objection passed upon by the trial court. Counsel for appellants say: "The only inference which can be drawn from the ruling is, that the proceedings did not, as a matter of law, authorize the construction of the boom." If it be meant by this statement, assuming that the river is not navigable, and that the county court exercised its jurisdiction in a proper case, that the ruling of the circuit court was to the effect that the defendants in the exercise of the rights acquired under their lease could not interfere with or obstruct the rights of riparian owners under the statute, without first obtaining their consent, as provided, we are inclined to think the ruling correct.

As the case must go back, and an opportunity will be afforded to get the precise point passed upon, it is better that we should reserve our judgment.

The judgment must be reversed and a new trial ordered.

[Filed March 4, 1892.]

J. V. LANKIN v. JAMES TERWILLIGER ET AL.

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ROADS AND STREETS—EASEMENTS AND SERVITUDES.—By the location of a county road, the public only acquires an easement in the land, while the fee remains in the owner, subject to this charge of the public thereon; and when the road is vacated by public authority, the land covered by it immediately reverts to the owner freed from the easement.

CONSTRUCTION OF DEEDS—HIGHWAY NAMED IN CONVEYANCE—ESTOPPEL.—It is a settled rule of law that when a grantor conveys land expressly with reference to a road or street over his other land, he and his successors in interest cannot, by reason of estoppel, so use the soil of the highway as to defeat the enjoyment thereof by the grantee, his heir, or assigns; but this principle will not be applied in the construction of a deed, unless it clearly

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appear that it was the intention of the parties to consider the use of the highway as part of the transaction, although there may be, in the description of the land, some reference to the highway as a monument.

Multnomah county: L. B. STEARNS, Judge.

Defendants appeal. Reversed.

R. & E. B. Williams & Carey, for Appellants.

U. S. Grant Marquam, for Respondent.

BEAN, J.—This suit is brought for the purpose of perpetually enjoining the defendants from enclosing, building upon, or otherwise obstructing what was formerly a county road adjoining plaintiff's property on the east. The plaintiff claims to have a right of way over the premises of defendants the full width of the former county road. From the pleadings and stipulation of the parties, it appears that prior to and on the third day of January, 1871, the defendant James Terwilliger and his then wife, Philinda, were the owners of the donation land claim in Multnomah county, along the east side of which was located a toll road known as the McAdam road, and over and across which was located a county road leading from the town or village of Fulton to the city of Portland, and used by the public as and for a public road; that on the third day of January, 1871, Terwilliger and wife sold and conveyed by warranty deed to the Portland Homestead Association, that portion of their donation claim west of the county road aforesaid, describing the land so conveyed by metes and bounds, commencing at a point on the west side of the county road, at the southeast corner of a piece of land known as the old cemetery, five chains south of the claim line between Terwilliger and Carruthers; thence with the meander of said road as follows: south 1° west 7.50 chains, south 12° west 7.50 chains, south 24° 45' west 4.87 chains, to the southeast corner of this tract of land; thence by courses and distances to the place of beginning.

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The deed also contained the grant of a right of way for three roads eighty feet wide across the intervening lands of the grantors from the McAdam road to the land conveyed. Immediately after the purchase by the Homestead Association, it caused the land to be laid off into lots and blocks, and a map or plat thereof to be recorded in the proper office. As so laid off and platted, the lots in block B extend from Douglas street, as designated on the plat, to the county road. The plaintiff is now the owner by purchase, and through mesne conveyances, of all the right, title, and interest of the Homestead Association in and to the east half of lot No. 3, in said block B, and has no way of egress or ingress to or from said property, except over and along the road or way in controversy here.

In January, 1880, the county of Multnomah, having acquired by purchase or condemnation the McAdam road, the road over and across the Terwilliger place was discontinued by the proper authorities and relocated on what was formerly the McAdam road. Subsequently the defendants, who are the successors in interest of Terwilliger and wife, took possession of the land formerly occupied by the county road; and having enclosed the same, erected two houses thereon, and deny the plaintiff's right to use the same or any portion thereof, as a way or otherwise. Hence this suit, which having been decided in plaintiff's favor in the court below, defendants appeal.

By the location of the county road over the lands of Terwilliger and wife, the public acquired no more than a right of way as an easement or servitude, with the powers and privileges incident thereto. The fee and all rights of property not incompatible with the public enjoyment as a way remained in the owners; and when the road was abandoned or discontinued by act of public authority, the land covered by it immediately reverted to them unincumbered by the easement or servitude. (Elliott on Roads,

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670; Angel on Highways, §§ 301-2; *Jackson v. Hathaway*, 15 Johns. 447; 8 Am. Dec. 263.)

But plaintiff claims that because the land sold and conveyed to the Portland Homestead Association was at the time bounded on the east by a public highway over the lands of the grantors, they and their successors in interest are estopped from setting up any claim or doing any acts inconsistent with the use of the road or way by their grantees or persons claiming under it, and that the discontinuance of the road by act of public authority only affects the rights of the public to use the road as a public highway. It seems to be a settled rule of law, that where a grantor conveys land, describing it as bounded expressly on a street or way over his other lands, or by reference to a map or plan upon which a street is shown, he and those claiming under him are forever afterwards estopped to deny the existence of such street as to the grantee, his heirs or assigns; and if the way is a public highway, and by competent authority should afterwards be discontinued, such grantor or successor in interest cannot use the soil of the highway so as to defeat the right of way of the grantee, his heirs or assigns, or render it substantially less beneficial. (3 Wash. Real Property, 420; *Howe v. Alger*, 4 Allen, 206; *White's Bank v. Nicholas*, 64 N. Y. 65; *Smith v. Lock*, 18 Mich. 56; *Sutherland v. Jackson*, 32 Me. 80; *Dawson v. Ins. Co.* 15 Minn. 136; 2 Am. Rep. 109.)

This doctrine rests upon the fact that the grantor, by describing the land as bounded by a way, when he is the owner of the soil under the way, intends thereby to confer upon the grantee, as appurtenant to the granted premises, the right to use such way; and whether it be deemed to operate as an implied grant, covenant, warranty or estoppel, binding on the grantor, his heirs or assigns, is immaterial. "The right itself would be inferred from that great principle of construction," says Mr. Chief Justice SHAW, "that every grant and covenant shall be so construed as to secure

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to the grantee the benefits intended to be conferred by the grant, and that the grantor shall do nothing to defeat or essentially impair his grant." (*Parker v. Framingham*, 8 Met. 268.)

The question in all such cases is, whether the road or way is intended as the boundary of the granted premises. Where the land is conveyed by a certain and definite description, as by metes and bounds, the fact that the boundary as described in the conveyance may be coincident with the line of the way, does not of itself raise the implication that such way was intended as the actual boundary, or confer upon the grantee the right to use such way as appurtenant to the granted premises, but it must appear from the conveyance, either directly or by fair inference, that it was intended to bound the land by the road or way. (*Parsons v. Johnson*, 68 N. Y. 62; 23 Am. Rep. 149.)

Now, in the case here, the land conveyed by Terwilliger and wife to the Portland Homestead Association is not described as bounded by the county road, nor do we think there is anything in the conveyance from which it can be inferred that it was so intended by the parties. The land is definitely described by metes and bounds, which carefully exclude the road, and which are complete and certain without reference to it. The starting point of the description is at a point on the west side of the county road, at the southeast corner of a piece of land known as the old cemetery, five chains south of the claim line. This corner of the cemetery lot is the controlling monument in the description, and is definite and certain without reference to the county road. In fact, if this corner be on the east side of the road instead of the west side, it would still be a controlling monument. It may be on the west side of the road, as stated in the deed, yet not exactly on the line of the road; and from this corner the courses and distances are given to the southeast corner of the tract conveyed, and by careful measurement exclude the land covered by the

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road. The only reference to the road in the deed is for the purpose of description, as any mark or monument might have been referred to, and with no intention of making it the actual boundary of the land, unless it should be coincident with the description as given in the deed. Such a description of the granted premises does not convey an easement in an adjoining highway. Merely referring to a highway for the purpose of description, as any other mark or monument, is very different from bounding the granted premises by a highway over the other lands of the grantor, and thereby exposing himself to the equities of an estoppel. (*King v. Mayor*, 102 N. Y. 171.)

The manifest intention of the parties, as shown by the deed, was to sell and convey a piece of land definitely described by metes and bounds, containing one hundred acres, the description of which is complete and certain, without reference to the road, and in effect excludes it. The object and purpose of every reference to the county road in the deed is, first, as a monument in connection with the corner of the cemetery to designate the starting point of the description; and, second, to indicate the course of the east line from that point. To hold that the language of this deed created an easement in the county road in favor of the grantee, would be going beyond any adjudged case which has come under our observation. The plaintiff cannot claim this as a way of necessity, for at the time of the conveyance to the Homestead Association it was simply a convenience and not necessary for access to the lands. This right depending upon necessity, only exists when the person claiming it has no other means of passing from the granted premises into the public street or road. (*Wash. Easements*, *163; *Smyles v. Hastings*, 22 N. Y. 217; *Gayetty v. Bethune*, 14 Mass. 49; 7 Am. Dec. 188.)

Here the grant of the three rights of way from the McAdam road over the intervening lands of the grantor destroyed the necessity for the one claimed, if it otherwise

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existed. It was at most only a convenience in addition to the three granted ways. In order to create such a way, the necessity must exist at the time of the conveyance, and as to the whole tract conveyed. The grantee cannot subsequently subdivide the tract and sell off a portion in such a manner as to make a way necessary to some particular portion thereof which did not exist as to the whole tract. In this case, plaintiff purchased the portion now owned by him after the county road had been discontinued, and with knowledge that it was cut off from Douglas street by the intervening portion of the lot, and cannot therefore claim a way of necessity as against defendants which his grantors did not have, or could not claim. In other words, if the right now claimed were not necessary for the complete enjoyment of the whole tract by the grantee from Terwilliger, such grantee could not, by subdividing and selling separate portions thereof, create a necessity for a way which was not necessary at the time of the conveyance to it. This county road was not in any way annexed as an easement to the land conveyed, or used in connection therewith, and therefore did not pass by the word appurtenances in the conveyance to the Homestead Association. To raise the implication of a grant of an easement as appurtenant to the land, the easement must be *de facto* annexed to the estate conveyed at the time of the grant, and must be necessary to its enjoyment in the condition in which it then is. (*Parker v. Bennett*, 11 Allen, 388.)

The decree of the court below is reversed and complaint dismissed.

Per Curiam.

[Filed March 4, 1892.]

ADOLPH FRANKE ET AL. v. A. R. SHIPLEY.

DESCENT—HEIRS.—Where a party claims as heir, he must first establish affirmatively his relationship with the deceased; and, second, that no other descendant exists to impede the descent to the plaintiff.

WILLS—TESTAMENTARY CAPACITY—STARE DECISIS.—In respect to testamentary capacity it is sufficient if the testator knew and understood what he was doing, and to whom he was giving his property when he executed his will. *Clark v. Ellis*, 9 Or. 128, and *Chrisman v. Chrisman*, 18 Or. 127, followed and approved.

Clackamas county: F. J. TAYLOR, Judge.

Plaintiff appeals. Affirmed.

C. D. & D. C. Latourette, for Appellants.

W. W. Thayer, and Miller & Miller, for Respondent.

PER CURIAM.—This is a suit to contest the validity of a will. It presents, mainly, two questions of fact to be decided from the evidence. First—Does the evidence establish the heirship of the plaintiffs to the testator? Second—Does it show that the testator was of sound and disposing mind at the time of the execution of the will?

Unless the plaintiffs were the heirs of the testator, they have no standing to impeach the validity of the will. They must establish by competent proof that they were the heirs of the testator and would inherit his estate were it not for the will. "Where a party claims as heir," says Mr. Lawson, "he must first establish affirmatively his relationship with the deceased; and, second, that no other descendant exists to impede the descent to the plaintiff." (6 Lawson's Rights, Rem. & Prac. § 3138.)

The will in question was made by John G. Franke to the defendant, who was not a relative, but a friend and neighbor. The plaintiffs and contestants claim to be his brothers and sisters. They ask to set aside his will on the ground of a lack of testamentary capacity. It is not necessary to load the record with the facts to show the conclusion

Per Curiam.

we have reached. While fully appreciating the difficulty of obtaining proof, under the circumstances, to establish pedigree, we do not think the evidence is sufficient to establish the heirship of the contestants with the decedent John G. Franke.

But if there be any doubt on this point, there is none in our minds on the second, namely, that the decedent had testamentary capacity at the time of the execution of his will. With reference to the amount of testamentary capacity necessary, it has been held by this court that it is sufficient if the testator knew and understood what he was doing, and to whom he was giving his property when he executed his will. (*Clark v. Ellis*, 9 Or. 128; *Chrisman v. Chrisman*, 16 Or. 127.)

The evidence as to the execution of the will shows that the will was read over to him before signing, that he knew its contents, and what he was doing. There is nothing to indicate that he was not sane, or in the full possession of his faculties, or that he was acting under any excitement or undue influence. He was undoubtedly a simple-minded man, and illiterate, but he was industrious, honest, and economical, and during his life accumulated a small estate. His reasons for leaving his property to the defendant are stated, and why it was not willed to his relatives.

We find nothing in the circumstances of the case which would justify us in holding that he lacked testamentary capacity, and must affirm the decree.

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[Filed March 4, 1892.]

M. H. MURPHY v. CITY OF ALBINA.**MUNICIPAL CORPORATIONS—OFFICERS AND AGENTS—EXCESS OF AUTHORITY—**

RATIFICATION.—A municipal corporation, like a private person, is liable for services performed for it under direction of its officers or agents, but in excess of their authority, provided it ratifies and accepts the same after they are brought to its official knowledge through proper channels; but mere silence or acquiescence will not amount to ratification; there must be some affirmative action in that respect, or action from which ratification would be necessarily inferred.

ITEM—COMMON COUNCIL—OFFICIAL MEETINGS.—Where the liability of a municipal corporation depends on the action of its common council, such action, to be binding, must be had by ordinance, resolution, or other equivalent proceeding at a meeting of such body regularly convened, and cannot be based on acts of individual members of the council not at an official meeting.

Multnomah county: E. D. SHATTUCK, Judge.

Plaintiff appeals. Affirmed.

George A. Brodie, for Appellant.

W. T. Muir, city attorney, for Respondent.

BEAN, J.—This is an action to recover on a *quantum meruit* for work and labor alleged to have been performed by plaintiff, in grading, cutting, and filling one of defendant's streets, known as Margaretta avenue. This is the second appeal in this case. For the purposes of this appeal, the facts sufficiently appear in the case as reported (20 Or. 379), except from this record it appears that plaintiff by his written contract was to grade Margaretta avenue, a public street of the defendant, to the grade established by the city, as surveyed and established by Hulbert & McQuinn, and according to a profile made by them and made a part of the contract the work to be done under the supervision of the committee on streets and public property, who should furnish the contractor with all necessary heights and distances, for which work he was to receive, on the approval in writing of the committee on streets and public property and engineer in charge, a certain rate per cubic yard for

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all necessary excavations and fills made by him, reference being made to a tracing made by the engineer in charge as to the number of yards of excavation or fill required.

The evidence tended to show that plaintiff proceeded to perform his contract, the engineer in charge setting stakes along the line of the work, giving the height as established by the defendant and provided in the contract. After he had finished grading according to the stakes set by the engineer, and was ready for laying sidewalk and planking, the engineer made a change in the grade stakes of from three to ten inches of a rise in the grade, the entire length of the street, and directed plaintiff to bring the surface of the street up to this line. Plaintiff complained to the mayor and two members of the council of the action of the engineer in changing the grade, and was by the mayor told "to go ahead and finish his work according to the engineer's instructions, and quit his complaining or he would not get paid for his work, or something to that effect"; that he did finish the work according to the instructions of the engineer, and was compelled to do four hundred and sixty-six dollars and twenty cents worth of work more than called for in his contract and the estimates accompanying the same; that he told one member of the council and the mayor that if they did not rectify the mistake there would be damages claimed, and on the day the street committee was examining the work after its completion he told them he should sue defendant for damages; that after the work was completed, the defendant accepted and paid for all the work provided in the contract, but refused to pay for any extra work as ordered by the engineer. It does not appear that the council as an official body authorized or assented to the change in the contract or street grade by the engineer, or directly ratified the same; nor does it appear that the common council directed or had knowledge that the plaintiff was doing the extra work, or knew that it had been done at the time the

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work under the contract was accepted, unless it might be inferred from the fact that the mayor and two members of the council knew of the change in the grade, and the mayor directed the work, and a majority of the individual members of the council knew that plaintiff threatened to make some claim for compensation for the extra work ordered by the engineer.

The errors complained of are in the giving and refusal of certain instructions by the trial court. The instruction requested by plaintiff and refused by the court, the refusal of which we held to be an error on the former appeal, to the effect that if the extra work was ordered by the engineer and performed by plaintiff under the direction of the mayor and two members of the council, and the city, acting through its proper officers, accepted the same, the defendant is liable, was in substance given in the general charge, the court adding an explanation in the opinion proper and necessary to a clear understanding by the jury, as to who are the proper officers and how they must act in order to bind the city, and therefore requires no further consideration here. On this point the former decision was, that if the work was performed in improving the streets of defendant without regular authority, by direction of some person assuming to act for it, and was afterwards accepted by defendant, this would be a ratification and equivalent to an original authority. But as to what would constitute an acceptance of the work, was not in the case, nor considered or decided by the court. The record then before us showed "that when said work (extra work) was completed, as ordered by the city surveyor, the same was accepted by the city of Albina," so that the only question was, whether under such a state of facts the city was liable for the reasonable value of the work.

But on the second trial the question of acceptance was the vital point in the case, and it was therefore proper and necessary for the court to instruct the jury fully upon this

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question, and the instruction as requested by plaintiff furnished no guide for the jury as to who are the proper officers of the city, and as to what would amount to an acceptance of the work. It follows therefore that this case must depend upon the correctness of the instructions as given by the court. The jury was instructed in effect, that in order for plaintiff to recover, it must appear that there was work done by plaintiff outside of his contract, at the request and with the knowledge of a majority of the members of the council, and that plaintiff made claim for the extra work, and the council, as an official body, recognized the claim and accepted the work, and that conversations with individual members of the council on the street would not amount to a contract or acceptance of the work, but in order to bind the city the council must have been together, acting as a body; and that if plaintiff did perform work outside of his contract, and the council simply undertook to accept the completion of the contract and pay what was earned under it, the city would not be liable for any extra work, although the members of the council may have been informed on the street as individuals that plaintiff claimed something for extra work. Certainly the defendant is not liable if it did not as a municipal corporation contract with or in any way authorize the plaintiff to do the extra work necessary to bring the street up to the grade established by its engineer, or by some corporate act ratify the contract or accept the work. Though it may be charged with the duty of regulating and repairing the streets, undoubtedly no action will lie against it for work or labor put upon them without its assent or authority. There is no room here for the contention that the defendant in any way contracted with or authorized plaintiff to perform this extra work. The only contract it made with him was the written one which provided expressly that the work should be done according to the grade as established by Hulbert & McQuinn. The provision in the contract, that the work

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should be done under the supervision of the committee on streets and the engineer in charge, conferred no authority upon either of them to change or modify in any essential particular the provisions of the contract. (*Bonesteel v. New York*, 22 N. Y. 162; *Rens v. Grand Rapids*, 73 Mich. 237; *Dillon v. Syracuse*, 9 N. Y. Supp. 98; *Genovese v. Mayor*, 55 N. Y. Superior, 397.)

When this contract was signed and executed, no officer of defendant had any authority to change its provisions unless expressly authorized by the common council. That body alone, or some one duly authorized by it, was competent to change the terms of the contract or the grade of the street. The duty of the engineer was to see that the terms of the contract were complied with and the street brought to the grade as provided therein, and for that purpose and that alone he was the agent of the city. But when he assumed to change the grade as established by the city he was doing an unauthorized act, and one in no way binding upon the defendant. The change made by him was a material one, raising the surface of the street from three to ten inches above that established by the city, and if valid, imposed upon the defendant a liability for four hundred and sixty-six dollar's worth of work in excess of its contract, and that without its assent. If such an act be valid and binding on the defendant, there is but little protection for municipal corporations against the unauthorized acts of subordinate agents.

It was argued that the act of the individual members of the council in assenting to the change of the grade and directing the plaintiff to complete the work according to the instructions of the surveyor is binding upon the defendant, and the opinion upon the former appeal is relied on as the law of this case. As to every point presented and decided by this court in the former case, the decision becomes the law of the case, binding upon both the parties and this court so far as the same state of facts

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is substantially presented, but no further. As we have already said, the only question presented or decided on the former appeal was, whether the defendant was liable upon an implied contract for work performed on its streets under the direction of some unauthorized person after it had accepted the work. As to whether the individual members of the council could bind the defendant by contracts or agreements made not as an official body, or what acts would constitute an acceptance of the work, were not presented, considered or decided.

The opinion of the chief justice must be read with reference to the question actually before the court, and the admissions and statements in the record, and when so read the doctrine contended for by plaintiff finds no support therein. It is an elementary principle that the affairs of a corporate body, private or municipal, can be transacted only at a corporate meeting, regularly convened, and that the acts of the individual members in no way bind the corporation. The only existence of the common council of a municipal corporation is as a board, "and they can do no valid act except as a board, and such act must be by ordinance or resolution, or something equivalent thereto." (1 Dil. Mun. Corp. 455; 15 Am. & Eng. Enc. Law, 1028; *Dey v. Jersey City*, 4 C. E. Green, 412; *Butler v. Charlestown*, 7 Gray, 12; *Stoytown &c. Road Co. v. Oraver*, 45 Pa. St. 386; *In re St. Helens Mill Co.* 3 Saw. 88; *Zottman v. San Francisco*, 20 Cal. 96; 81 Am. Dec. 96; *Gaswiler v. Willis*, 23 Cal. 11; 91 Am. Dec. 607.)

The contract with plaintiff was formally entered into by the authority of the common council of defendant, and if a change were desired, it could only be made by the same parties that made the contract,—the common council or its authorized agent on one side and plaintiff on the other. Declarations or agreements of one or more, or even all of the councilmen, not at an official meeting, that they would be willing to consent to a change in the grade and allow plaintiff extra pay for the increased work, do not

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bind the defendant. The defendant could consent to a change in the contract only by its council acting as a body or through some authorized agent, and not by the several members of the council acting as individuals. (*Stoystown etc. Road Co. v. Craver*, 45 Pa. St. 386; *Schumm v. Seymore*, 24 N. J. Eq. 143.) The work, then, having been performed by plaintiff without any contract with or authorization by the defendant, it follows that it is not liable unless it has by some corporate act ratified or assented to the same. The only body competent to accept the work or ratify the contract is the common council of the defendant, and it can only act when duly convened in some manner provided by law. Corporations may be and often are bound by implied contracts within the scope of their powers, to be deduced by inference from authorized corporate acts without either a vote or resolution of their governing bodies. (1 Dil. Mun. Corp. § 459.) And where a contract has been entered into in good faith, and the city has received the benefit of the performance, a ratification of the unauthorized contract may under some circumstances be inferred without any formal action of the corporate authorities; but when the work is performed upon a public street of a municipality without its assent, no implied contract can be inferred from the fact that the street is subsequently used by the public. (*Taft v. Montague*, 14 Mass. 281; 7 Am. Dec. 215; *McDonald v. Mayor*, 68 N. Y. 23; 23 Am. Rep. 144; *Davis v. School Dist.* 24 Me. 349; *Pratt v. Swanton*, 15 Vt. *147; *Wilson v. School Dist.* 32 N. H. 118; 1 Dil. Mun. Corp. § 464.) In such case, to render the municipal corporation liable, the contract must be ratified or the work accepted by some express act of the council. Any other doctrine fails to extend to municipal corporations the privileges and immunities that are accorded by law to other contracting parties, public or private.

Nor can any inference of acceptance or ratification be deduced from the acts of the council in accepting or paying for the work performed under the written contract. This

it not only had a right but by its contract was bound to do. And because it complied with the terms of its contract, no inference can be drawn that it intended to accept any work performed without its authority or assent. (*Durango v. Pennington*, 8 Col. 257.) Before it can be held to have accepted the work performed by plaintiff by the direction of the engineer and individual members of the council, it must appear by some affirmative act that it accepted the work, or from which such acceptance can be inferred. Mere silence is not sufficient; for if so it would require a meeting of the council and an express dissent every time an officer undertakes to impose an unauthorized liability upon the city, to enable the corporation to prevent ratification. (*Otis v. Stockton*, 76 Me. 506.) Of course, there may be times when a corporation as well as an individual should act or speak, or when it does speak by the force of circumstances; but such is not this case.

It is urged that the court erred in holding that the knowledge that plaintiff made some claim for extra work, obtained by individual members of the council, on the street, would not bind them when they came to vote upon the resolution offered, to accept the work performed under the contract with plaintiff, unless the plaintiff made such claim at the time the resolution was under consideration. In support of this contention, reliance is had upon the language of the court in the former opinion, that "two of the members of the council and the mayor who authorized the work, had knowledge of their own acts in directing the work to be done, and when they met and accepted it, it is difficult to see why the city was not thereby rendered liable." It will be observed that this statement is also based upon the fact that the work was accepted by the council at an official meeting; and it was held that having so accepted the extra work, the defendant was liable without any formal resolution authorizing or ratifying the act

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of the engineer and individual members of the council in directing it to be done, and that the ratification would be implied from the act of accepting the work with knowledge that plaintiff claimed pay therefor. But it is not perceived how knowledge that plaintiff claimed pay for work performed under an unauthorized contract can render the defendant liable until it has done some act amounting to an acceptance of the work or ratification of the contract. Even had the individual members of the council, who had knowledge of and directed this work, agreed with plaintiff to ratify the contract at a subsequent meeting of the council, such arrangements would have been contrary to public policy, and not binding upon them, when they came to act officially upon the question. (*McCortle v. Bates*, 29 Ohio St. 419; 23 Am. Rep. 758.) A sufficient answer to the suggestion that the conclusion we have reached works a hardship upon plaintiff, who in good faith performed the extra work, supposing that the persons who directed it to be done were authorized to do so, is, that every person dealing with the agents of a municipal corporation must at his peril see that such agents are acting within the scope of their authority and line of their duty, and if he make an unauthorized contract he does so at his own risk. The courts cannot disregard the well settled rules of law in order to avoid an apparent injustice in a particular case.

The judgment of the court below is therefore affirmed.

Statement of the case.

[Filed March 7, 1892.]

MARY RODNEY ADAIR ET AL. v. BETHENIA A.
OWENS ADAIR ET AL.

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27	47

22	115
38	160
38	256

22	115
147	407

Per STRAHAN, C. J.:

EQUITY—MORTGAGE—SPECIFIC PERFORMANCE.—A party who holds a deed for land, absolute in form, but in fact a mere security for money loaned, is a mortgagee only, without title to the land, and will not be compelled by a decree in equity to specifically perform a contract to convey the land, because such a decree would be ineffectual.

Per BEAN, J.:

SUIT TO REDEEM—CASE IN JUDGMENT.—Pleadings examined, and *held*, that the bill discloses facts sufficient to constitute a cause of suit for redemption of the lands in controversy from the lien of a mortgage.

Clatsop county: F. J. TAYLOR, Judge.

Plaintiffs appeal. Reversed.

The court below first struck out a part of plaintiffs' complaint and then sustained a demurrer to the residue and entered a final decree in favor of the defendants, from which this appeal is taken. The great prolixity of the complaint almost forbids its insertion in this statement, but the points decided by the court below will be best understood by its insertion. It is as follows:—

"The above named plaintiffs Mary Rodney Adair and Samuel D. Adair complain of the above named defendants Bethenia A. Owens Adair and John Adair, and for cause of suit allege: That on the eighth day of March, 1882, the plaintiff Mary Rodney Adair was, ever since has been, and now is the wife of the plaintiff Samuel D. Adair; that on the fourteenth day of October, 1885, the defendant Bethenia A. Owens Adair was, ever since has been, and now is the wife of the defendant John Adair, and that during the time of the happening of the several transactions and the execution of the several instruments herein-after set forth, in which the defendant John Adair was concerned, he, bearing the same name as his father, who

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was then living, was known and described in said transactions and instruments as John Adair, junior.

"That on said eighth day of March, 1882, the plaintiff Samuel D. Adair was the owner of and in possession of the following described lands, situated in the county of Clatsop and state of Oregon, to-wit: The lots numbered five, six, and seven of section twenty-six, and the lots numbered seven and eight of section twenty-seven, in township eight north, of range ten west of the Willamette meridian in the district of lands subject to sale at Oregon City, in the state of Oregon, containing one hundred and sixty-three and eighty-six hundredths acres, hereinafter called his homestead entry; and on said day the defendant John Adair was the owner of and in possession of the following described lands, situated in Clatsop county, to-wit: The lot numbered nine and the southeast quarter of the southeast quarter of section twenty-three, and the lots numbered one and two of section twenty-six, and the southwest quarter of the southwest quarter of section twenty-four, all in township eight north, of range ten west of the Willamette meridian, in the district of lands subject to sale at Oregon City, in the state of Oregon, containing one-hundred and sixty-five and eighty hundredths acres, hereinafter called his homestead entry; and on said day the plaintiff Samuel D. Adair and the defendant John Adair owned and possessed jointly the following described land situated in said Clatsop county, to-wit: The east half of the donation land claim of George W. Coffinberry, situated in sections twenty-two, twenty-three, twenty-six and twenty-seven, in township eight north, of range ten west, Willamette meridian, in the district of lands subject to sale at Oregon City, in the state of Oregon, containing three hundred and twenty acres, or thereabouts.

"That on said day, the plaintiff Samuel D. Adair and the defendant John Adair were indebted to one George H. Mendell in the sum of five thousand two hundred and

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forty-eight dollars and eighty-three cents, or thereabouts, and were unable to pay the same; and on said day the plaintiffs did execute and deliver to the said George H. Mendell, a conveyance, absolute in form, of all the lands above described, as the homestead entry of the plaintiff Samuel D. Adair, and of the interest of the plaintiff in the lands above described as being jointly owned by himself and the defendant John Adair, and also all the right and title of said plaintiff to tide and overflowed lands, and all privileges of water front appertaining or belonging to said lands to ship channel in the Columbia river, together with the tenements, hereditaments and appurtenances to all of said lands belonging or in any wise appertaining. Said conveyance is hereinafter referred to as deed A.

"And on said day the defendant John Adair, being then unmarried, did execute and deliver to said George H. Mendell a conveyance, absolute in form, of the lands above described as his homestead entry, and of his interest in the lands above described, as belonging jointly to himself and the plaintiff Samuel D. Adair, and all of his right and title to tide lands and overflowed lands, and all privileges of water front appertaining or belonging to said lands to ship channel in the Columbia river, together with the tenements, hereditaments, and appurtenances to said lands belonging or in any wise appertaining. Said conveyance is hereinafter referred to as deed B; that while said conveyances were in form absolute transfers of title to the lands therein mentioned, nevertheless it was understood and agreed by and between the plaintiffs and the defendant John Adair of the one part and George H. Mendell of the other part, at the time of the delivery and acceptance of the said conveyances, that the conveyance called deed A was executed and delivered by the plaintiffs, and the conveyance called deed B was executed by the defendant John Adair, and both of said conveyances were received and accepted by the said George H. Mendell, not as absolute transfers of the

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title to the lands in said conveyances, respectively mentioned, but as mortgages for the better securing of the payment of the sums of money above mentioned as owing from the said Samuel D. Adair and John Adair to the said George H. Mendell, and not otherwise; and it was further understood and agreed by and between these plaintiffs and the said John Adair of the one part and the said George H. Mendell of the other part, at the time of the execution and delivery of said conveyances, that whenever the said Samuel D. Adair and John Adair should pay to the said George H. Mendell the sum of money above mentioned, with interest thereon at the rate of ten per cent per annum from the eighth day of March, 1882, he the said George H. Mendell would immediately thereupon re-convey to the said Samuel D. Adair the title to said lands conveyed to him by the instrument called deed A, and to the said John Adair the title to the lands conveyed to him by the instrument called deed B, and that he would make such conveyance to either of them upon the payment of one-half said sum; and the said Samuel D. Adair was allowed by the said George H. Mendell to continue in the possession of the lands owned by him, and the said John Adair to continue in the possession of the lands owned by him, and the two to continue in the possession of the lands owned by them jointly.

"That thereafter, to wit, on the tenth day of April, 1883, the plaintiff Samuel D. Adair became the owner of and entered into possession of the following described land, situated in said Clatsop county, to wit: All the tide land lying north of, fronting and abutting upon the east half of the donation claim of George W. Coffinberry, in sections twenty-two and twenty-three, in township eight north, of range ten west, of the Willamette meridian, containing one hundred and one and seventy-two hundredths acres, hereinafter called his tide land purchase; and upon his procuring title to said land, it was considered and agreed by and

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between the plaintiffs and the defendant John Adair and said George H. Mendell that the same should also be conveyed to him; and on the twentieth day of April, 1883, in pursuance of such agreement, the plaintiffs executed and delivered to said George H. Mendell a conveyance, absolute in form, of the title to said lands, together with the tenements, hereditaments, and appurtenances thereunto belonging. Said conveyance is hereinafter referred to as deed C.

"That said conveyance was executed and delivered by the plaintiffs and received and accepted by the said George H. Mendell upon the same terms and conditions in every respect as appertained to the conveyance called deed A, as hereinbefore fully set forth and shown; and the said Samuel D. Adair was allowed by the said George H. Mendell to remain in the possession of said lands; that after the execution and delivery of the conveyances above mentioned, and until the fourteenth day of October, 1885, said George H. Mendell continued to hold said conveyances, and no part of his said claim against the plaintiff Samuel D. Adair and the defendant John Adair was paid.

"Wherefore and because the said George H. Mendell was desirous of securing payment of said claim, and said Samuel D. Adair and John Adair were both unable to make payment of the whole of his share thereof, it was on said day mutually agreed by and between the plaintiffs and defendants and said George H. Mendell that the defendant Bethenia A. Owens Adair would discharge the indebtedness of the said Samuel D. Adair and John Adair to the said George H. Mendell, and that he, the said George H. Mendell, would thereupon transfer to her, the said Bethenia A. Owens Adair, the title to the lands previously conveyed to him by the instruments hereinbefore described, and that she should receive, accept and hold the title to said lands in all respects upon the same terms and conditions as the same were held by the said George H. Mendell, whereof she was then and there by the plaintiffs,

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the defendant John Adair and said George H. Mendell fully advised.

"That thereupon and in pursuance of said agreement, the said George H. Mendell and Ellen A. Mendell, his wife, did on said fourteenth day of October, 1885, execute and deliver to the said Bethenia A. Owens-Adair their certain written obligation, called a bond for deed, whereby they agreed and bound themselves, upon the payment by her of the said debt owing to said George H. Mendell, and upon certain conditions therein named, to execute and deliver to the said Bethenia A. Owens Adair on or before the first day of January, 1887, a conveyance of the title to the following-described lands, situated in said Clatsop county, to wit: All those certain pieces or parcels of land known as the east half of the Coffinberry donation land claim and the frontage thereof to ship channel of the Columbia river; also the homestead claim of said John Adair and said Samuel D. Adair, together with all improvements and hereditaments thereon or anywise appertaining thereto, all said lands being and lying in township eight north, range ten west of the Willamette meridian, containing six hundred and forty acres, more or less. Said instrument is hereinafter called bond A.

"That thereafter, to wit, on the twenty-fifth day of November, 1885, John Adair, the father of the plaintiff Samuel D. Adair and the defendant John Adair, herein called the elder, and Mary Ann Adair the mother of said plaintiff and defendant, were each the owners of a tract of land situated in said Clatsop county, adjoining the east half of the said Coffinberry donation land claim, and known as the Brian Lavery donation land claim, lying in township eight north, range ten west, of the Willamette meridian, and containing three hundred and nineteen and eighty-nine hundredths acres; and said John Adair, the elder, and Mary Ann Adair were desirous of conveying and had agreed to convey to the plaintiff Samuel D. Adair

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and the defendant John Adair equally the title to said lands in consideration of the payment by said plaintiff and defendant of the sum of two hundred dollars per annum to them and to the survivor of them, during life, and of the further payment at the death of the survivor of them to their heirs of the sum of four thousand dollars.

"And thereupon the plaintiff Samuel D. Adair and the defendant John Adair, wishing to make provision for the segregation of their interests in the lands, then held by the said George H. Mendell, and agreed to be conveyed by him to the defendant Bethenia A. Owens Adair, as well as the said Lavery donation land claim, proposed to be conveyed as aforesaid, and the plaintiff Samuel D. Adair wishing his interest in all of said lands to be conveyed to the plaintiff Mary Rodney Adair in his stead, and the defendant John Adair wishing his interest in all of said lands to be held by defendant Bethenia A. Owens Adair in his stead, it was on said day mutually agreed by and between the plaintiffs and defendants and said John Adair, the elder, and Mary Ann Adair that the plaintiff Samuel D. Adair should execute to the said John Adair, the elder, and Mary Ann Adair his writing obligatory, whereby he should agree and bind himself to pay to their heirs the sum of two thousand dollars, less his interest as heir, for his interest in said Lavery donation land claim, proposed to be conveyed to him; and the said John Adair, the elder, and Mary Ann Adair would execute to the defendant Bethenia A. Owens Adair a conveyance of the whole of said Lavery donation land claim upon her executing to them her writing obligatory, whereby she would agree and bind herself to pay to them during their lives and to the survivor during his or her life the sum of two hundred dollars per annum, and to pay to their heirs the sum of two thousand dollars, less the interest of the said John Adair as an heir; that said defendant should thereupon by her writing obligatory, agree and bind herself that upon her obtaining the title from the said

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George H. Mendell, and upon the payment to her by the plaintiff Mary Rodney Adair of the moneys owing to said defendant from the plaintiff Samuel D. Adair, by reason of the matters hereinbefore stated, and of the sum of one hundred dollars per annum, being half the annuity agreed by said defendants to be paid to said John Adair the elder and Mary Ann Adair, as aforesaid, said defendant would convey to said plaintiff the one-half of all the lands then held or to be acquired by her as hereinbefore set forth, and that said defendant should retain the other half of all of said land to her own use.

"That thereupon, and in pursuance of said agreement, the plaintiff Samuel D. Adair on said day entered into a written agreement, and delivered the same to the said John Adair the elder and Mary Ann Adair, whereby he bound himself, his heirs, executors, and administrators, to pay their heirs the sum of two thousand dollars, less his interest as heir. And thereupon, and in the further pursuance of said agreement, the said John Adair, the elder, and Mary Ann Adair on said day executed and delivered to the said defendant Bethenia A. Owens Adair a conveyance of all their right, title, and interest in and to the said Lavery donation land claim for an expressed consideration of one dollar and other valuable considerations.

"And thereupon, and in further pursuance of said agreement, the defendant Bethenia A. Owens Adair on said day entered into a written agreement with and delivered the same to the said John Adair the elder and Mary Ann Adair, whereby said defendant agreed and bound herself, her heirs, executors and administrators, to pay to them, and to the survivor of them during life, the sum of two hundred dollars per annum, and to pay to their heirs the sum of two thousand dollars, less the interest of the defendant John Adair as heir; that the said defendant paid nothing for the execution to her of said last-mentioned conveyance, and the only consideration therefor was the

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terms of the agreement above set forth, and her promise contained in her written obligation, last above set forth.

"That thereafter, and in further pursuance of said agreement, the defendant Bethenia A. Owens Adair on said day entered into with and delivered to the plaintiff Mary Rodney-Adair her certain writing obligatory called a bond for a deed, whereby said defendant agreed and bound herself, her heirs, executors and administrators, upon the performance of certain conditions therein expressed, and the payment of certain moneys therein set forth, at certain fixed times therein stated, and the further payment by said plaintiff to said defendant of the sum of one hundred dollars per annum during the life of the said John Adair the elder and Mary Ann Adair, and the life of the survivor of them, that she, said defendant, would convey to the plaintiff the following described parcels of the land hereinbefore set forth, to-wit, the homestead entry of the plaintiff Samuel D. Adair, and all that portion of the east half of the Coffinberry donation land claim which lies on the west side of the slough known as Adair's slough, from the point where the main branch of said slough crosses the northern boundary line of Samuel D. Adair's homestead entry, called point A, northerly along said slough to the point where the same empties into Young's bay, called point B, and also such part of the Lavery donation land claim as should be found lying west of the main branch of said slough between said points A and B, and also the west half of the water frontage of the east half of the Coffinberry donation land claim, said west half of the frontage to be bounded on the east side by a north and south line drawn from the shore line of Young's bay to the ship channel of the Columbia river, and between and equally distant from two parallel lines which extend due north from the eastern and western points of the shore line of Young's bay with the said east half of the Coffinberry donation land claim, it being understood and agreed that

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said water frontage was the west half of the water frontage of the east half of the Coffinberry donation land claim as originally purchased from the state of Oregon by the plaintiff Samuel D. Adair, and above described in his tide land purchase, together with the tenements, hereditaments and appurtenances to said lands belonging or in any wise appertaining. And it was then and there agreed by and between the plaintiffs and defendants and the said John Adair the elder and Mary Ann Adair, that upon the full execution by the defendant Bethenia A. Owens Adair of the conveyance in said instrument mentioned, she should retain to her own use all the other lands hereinbefore described as conveyed to her or proposed to be conveyed; that the defendant John Adair fully assented to the terms of said instrument, and on the eighth day of December, 1885, by written endorsement thereon over his own signature, bound himself to join in such deed of conveyance as might be executed by the defendant Bethenia A. Owens Adair to the plaintiff Mary Rodney Adair, in pursuance of the terms of said instrument. A copy of said instrument with said endorsement thereon is hereto annexed as an exhibit and made a part of this complaint, and marked Exhibit A.

"That the annual payment of one hundred dollars provided for in said instrument was intended to reimburse the defendant Bethenia A. Owens Adair for one-half of the annual payment of two hundred dollars, agreed by her to be paid to the said John Adair the elder and Mary Ann Adair, being one-half of said sum originally designed to be paid by the said Samuel D. Adair; that upon the execution and delivery of said instrument to the plaintiff Mary Rodney Adair she was, by defendant Bethenia A. Owens Adair, placed in sole and exclusive possession and occupancy of the lands in said instrument described, and has so continued to the present day.

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"That Adair's slough, hereinbefore mentioned, is a natural watercourse, having its source near the south boundary line of section eight, above mentioned, and the main branch thereof, hereinbefore mentioned, flows in a northerly course through a sinuous channel across the lands above described as the homestead entry of the plaintiff Samuel D. Adair, the east half of the Coffinberry donation land claim and the Lavery donation land claim; and it was, on said twenty-fifth day of November, understood and believed by the plaintiffs and defendants, that of the east half of said Coffinberry donation land claim there lay on the east side of the main branch of said slough between said points A and B, thirty acres; and of the Lavery donation land claim there lay on the west side of said main branch between points A and B, twenty acres; that the agreement for a division of said property entered into between the plaintiffs and defendants as above set forth, and the execution, delivery, and acceptance of the instrument, whose copy is above set forth as Exhibit A, were all based upon said understanding and belief that the main branch of said slough intersected the east half of said Coffinberry donation land claim and the said Lavery donation land claim, between said points A and B, as above set forth, and not otherwise; but in fact and in truth, there is on the east side of the main branch of said slough between said points A and B, fifty-five acres, or thereabouts, of the east half of said Coffinberry donation land claim, and on the west side thereof but three acres, or thereabouts, of the Lavery donation land claim; and that said discrepancy was not known to the plaintiffs, or either of them, until after the execution of the conveyance from the defendant Bethenia A. Owens Adair to B. Wistar Morris, in trust to the plaintiff Mary Rodney Adair, hereinafter set forth.

"That thereafter, and in pursuance of the agreement hereinbefore set forth, as having been entered into by and

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between the plaintiffs and defendants, of the one part, and the said George H. Mendell, of the other part, on the fourteenth day of October, 1885, and in discharge of the obligation hereinbefore set forth, called bond A, to-wit, on the twenty-first day of December, 1886, the said George H. Mendell and Ellen A. Mendell, his wife, in consideration of the sum of six thousand eight hundred and seventy-five dollars, to said George H. Mendell paid by the defendant Bethenia A. Owens Adair, for and on account of the plaintiff Samuel D. Adair and the defendant John Adair, executed and delivered to the said defendant Bethenia A. Owens Adair, a certain instrument of conveyance of the title of the homestead entry and the tide land purchase of the plaintiff Samuel D. Adair, and the homestead entry of the defendant John Adair, and the east half of the Coffinberry donation land claim.

"That on the thirtieth day of December, 1885, the plaintiff Mary Rodney Adair paid to the defendant Bethenia A. Owens Adair the sum of one hundred and sixty-two dollars and eighty-seven cents, being the full amount of interest to date of payment due from said plaintiff to said defendant on the instrument, whose copy is hereinbefore set forth as Exhibit A, and on the thirty-first day of December, 1886, said plaintiff paid to said defendant the sum of two hundred and fourteen dollars and four cents, being the full amount of interest to date of payment due on said instrument, and on the twenty-ninth day of April, 1887, said plaintiff paid to said defendant the sum of one thousand dollars on account of the expense of constructing a certain dyke, provided for in said instrument, and said plaintiff was allowed a further credit of sixty-eight dollars and twenty-two cents as discount on said payment of one thousand dollars for having made the same before it fell due, under the terms of said instrument; and said plaintiff, on the twenty-ninth day of April, 1887, paid to said defendant the sum of fifteen hundred dollars, on account

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of the principal of the moneys mentioned in said instrument, and in consideration of said payment, at the request of said plaintiff the defendant executed and delivered to B. Wister Morris in trust for said plaintiff, a conveyance for the following described portion of the lands described in said instrument, to-wit, all that portion of the east half of the Coffinberry donation land claim which lies on the west or left hand side of the slough, called Adair's slough, from the point where the main branch of said slough crosses the northern boundary line of the plaintiff Samuel D. Adair's homestead entry to the point where said slough empties into Young's bay, together with the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, but not including any portion of the Samuel D. Adair's tide land purchase.

"That on the eighteenth day of December, 1885, John Adair the elder and Mary Ann Adair caused to be spread upon the record of deeds for said Clatsop county the agreement entered into between them and the defendant Bethenia A. Owens Adair, on the twenty-fifth day of November aforesaid, and thereafter, to wit, on the sixteenth day of December, 1886, said defendant was desirous of obtaining a loan of money on said Lavery donation land claim by securing said loan by a mortgage upon said lands; and objection being made to said agreement as an encumbrance thereon, in order to enable her to accomplish such end, she requested said John Adair, the elder, and Mary Ann Adair to release said agreement so as to enable her to effect said loan, promising to reexecute and re-deliver the same as soon as said loan should be effected; that thereupon said John Adair the elder and Mary Ann Adair acceded to said request, and by the way of releasing said agreement made the following endorsement upon the margin of the record, to wit, 'I hereby acknowledge satisfaction in full of the requirements of the within instrument, hereby canceling the same, this sixteenth day of December, A. D. 1886,' and subscribed

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their names thereto; that thereupon said defendant effected said loan and executed said mortgage, and immediately afterwards re-dated said agreement and re-delivered the same to the said John Adair the elder and Mary Ann Adair; that on or about the ninth day of April, 1888, the said John Adair the elder died on the — day of February, 1890, at the request of the plaintiff Mary Rodney Adair, the said Mary Ann Adair executed and delivered to said plaintiff, to be delivered to said defendant, a certain instrument in writing, whereby the said Mary Ann Adair released said defendant from her liability to pay one hundred of the two hundred dollars per annum agreed by said defendant to be paid to said Mary Ann Adair in her written obligation aforesaid; * * * that said Mary Rodney Adair has paid all taxes assessed upon the lands described in said bond for deed up to this date, but that she was unable, for want of means wherewith to pay the same, to make any other payments provided for in said bond for deed from defendant Bethenia A. Owens Adair to said plaintiff as said payments matured, but on the — day of February, 1890, the said plaintiff tendered to the said defendant the instrument of release from the said Mary Ann Adair, and at the same time tendered to said defendant the sum of five thousand one hundred and sixty-two dollars and thirty-eight cents in United States gold coin as full payment to said date of all moneys owing from said plaintiff to said defendant on account of said bond for deed, and demanded from the defendants the execution and delivery of a conveyance for the lands described in said bond for deed, and not already conveyed to said B. Wistar Morris, as above set forth, in accordance with its terms, and in addition thereto so much of the lands of the east half of the Coffinberry donation land claim as lie east of the main branch of Adair's slough, between the points aforesaid, and exceed in area so much of the Lavery donation land claim as lies west of said main branch, and ten

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acres in addition thereto, on account of the error in regard to the course of the main branch of said slough, hereinbefore set forth, to compensate said plaintiff for the loss occasioned to her by the terms of said bond for deed growing out of said error; but that said defendant refused to accept said release of Mary Ann Adair or said sum of five thousand one hundred and sixty-two dollars and thirty-eight cents, or to execute to said plaintiff a conveyance for the lands covered by said bond for deed and not heretofore conveyed to said B. Wistar Morris, or for the additional tract of that portion of the east half of the Coffinberry donation land claim which lies east of the main branch of said Adair's slough between said points, and exceeds in area that portion of the Lavery donation land claim which lies on the west side of said main branch, and ten acres in addition thereto; whereupon the said plaintiff Mary Rodney Adair brings said release and said sum of five thousand one hundred and sixty-two dollars and thirty-eight cents in United States gold coin into court to be delivered and paid to the defendant Bethenia A. Owens Adair, upon the execution and delivery by her and the defendant John Adair to said plaintiff of a conveyance as provided in said bond for deed, for the lands held by the defendant Bethenia A. Owens Adair of those described in said bond for deed, and not heretofore conveyed by her to said B. Wistar Morris, as aforesaid, and of the additional tract above mentioned, as being due said plaintiff on account of the error in regard to the course of the main branch of Adair's slough, as above set forth, or upon such terms and conditions as the court may order and direct.

"That the value of that portion of the tide land purchased of the plaintiff Samuel D. Adair, which was agreed to be conveyed to the plaintiff Mary Rodney Adair by the defendant Bethenia A. Owens Adair, in her bond for deed above set forth, is four hundred dollars per acre; the value of that portion of the east half of the Coffinberry donation

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land claim which lies east of the main branch of Adair's slough, between said points, is three hundred dollars per acre, and the value of the homestead entry of the plaintiff Samuel D. Adair is one hundred dollars per acre.

"Wherefore, the plaintiffs pray a decree of this honorable court relieving the plaintiff Mary Rodney Adair from her default in failing to make such payments provided for in the bond for deed executed to her by the defendant Bethenia A. Owens Adair, and hereinbefore set forth, as she did not make at the time of their maturity and relieving said plaintiff from any forfeiture she may have incurred under the terms of said bond for deed in the matter of the redemption of the lands therein described or any part thereof; and amending and correcting said bond for deed so as to make the same conform to the understanding of the plaintiffs and defendants, at the time the same was executed and accepted as to the course of the main branch of Adair's slough, and that it may be considered as extended to cover all that portion of the east half of the Coffinberry donation land claim which lies on the east side of the main branch of said slough between said points A and B, and exceeds in area so much of the Lavery donation land claim as lies on the west side of said main branch between said points and ten acres in addition thereto," etc., etc.

The court below allowed a motion to strike out part of the foregoing complaint, and then sustained a demurrer to the residue on the ground that the facts stated do not constitute a cause of suit, and entered a decree dismissing the suit, from which this appeal is taken.

John H. Smith, and Cox, Teal & Minor, for Appellants.

W. W. Thayer, for Respondent.

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arise out of the defendants' motion to strike out certain portions of the complaint and the demurrer to the residue; but we prefer to reach the merits of the case, so far as possible, aside from the mere forms of pleading.

The first question to which we think it necessary to direct our attention is, the nature of the title held by the defendant Bethenia A. Owens Adair to all the lands attempted to be conveyed to her by George H. Mendell and wife. Mendell's title, derived from the Adairs, though in the form of an absolute deed, was designed and intended by all the parties to it as a mortgage to secure the payment of money; and the defendant Bethenia A. Owens Adair took the conveyance from him with full knowledge of these facts, but with a further agreement on her part that she would hold the same subject to the same terms and conditions under which Mendell had previously held the same.

It is too well settled in this state to admit of any kind of controversy, that a deed, though absolute in form, if intended by the parties to it as security for money or the performance of any other lawful act, is a mortgage. (*Hurford v. Harned*, 6 Or. 362; *Stephens v. Allen*, 11 Or. 188; *Albany & Santiam W. D. Co. v. Crawford*, 11 Or. 243; *Wilhelm v. Woodcock*, 11 Or. 518.) And it is equally as well settled that a mortgage vests no title in the mortgagee, but is a mere security. (*Anderson v. Baxter*, 4 Or. 105; *Sellwood v. Gray*, 11 Or. 534.)

And this does not depend on the form of the conveyance, but upon the real character of the instrument. It is believed to be the better doctrine, that if a deed absolute in form be made merely to secure an indebtedness, it is a mere mortgage, and does not pass the legal title. (*Smith v. Smith*, 80 Cal. 323; *Hall v. Arnott*, 80 Cal. 348; *Booth v. Hoskins*, 75 Cal. 271; *Raynor v. Drew*, 72 Cal. 307; *Healy v. O'Brien*, 66 Cal. 517; *Taylor v. McLain*, 64 Cal. 513; *Murdock v. Clarke*, 90 Cal. 427; *Lane v. Shears*, 1 Wend. 434; *Peugh v. Davis*, 96 U. S. 332; *Odell v. Montross*, 68 N. Y.

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499; *Brinkman v. Jones*, 44 Wis. 498; *Howe v. Carpenter*, 49 Wis. 697.)

The first part of this proposition having already been adopted in this state, the second is a logical sequence, and must follow the first. The result of these conclusions is, that the defendant acquired no title to the real property attempted to be transferred to her by Mendell, nor to the other lands attempted to be conveyed as security, and which she was to hold for the same purpose as the Mendell lands. The deeds to her, though absolute in form, under the allegations in the complaint, which, for the purposes of the suit the demurrer admits to be true, are mortgages, and she acquired no title in the land by virtue thereof which she could transfer or assign without foreclosure. Under this state of facts, a decree for a specific performance would be ineffectual. The plaintiff could not by such decree obtain the title which the defendant agreed to convey. In such case it is the settled practice of courts of equity to refuse a decree which it would be utterly unable to enforce.

In *Franz v. Orton*, 75 Ill. 100, it was held that when a party purchasing land of one clothed with the legal title, has notice, actual or constructive, that another owns it, and that the vendor holds the legal title as security for money owing him and others, he cannot be placed in a better position than the vendor, and a court of equity will refuse to enforce the specific execution of his contract of purchase. So in *Love v. Cobb*, 63 N. C. 324, it was held that where one bargains for the land of another, who, as he knows, has only an equitable title, upon the latter being unable to procure a title by the refusal of his bargainor to convey, he is not bound to a specific performance of his contract. And in *Hill v. Fiske*, 38 Me. 520, it was held that an agreement in writing to procure for the plaintiff a good and sufficient deed of a certain tract of land, the title of which was not in the respondent, and that was known to the plaintiff, lays no foundation for a court of equity to decree

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a specific performance of the contract. In disposing of this case, the court said: "It is obvious, when the party contracting has no title to the land agreed to be conveyed, that there is nothing upon which a decree for a specific performance can operate." So also in *Shields v. Trammell*, 19 Ark. 51, it was held that a specific performance of a contract for the conveyance of land would not be decreed when the vendor has no title, or has, since the contract, conveyed the land to a stranger without notice.

In *Ferrier v. Buzick*, 2 Iowa, 136, it was held that courts of equity will decree parties to perform that which in legal contemplation they are able to perform, and not that which it is manifest they have no legal power to carry out; and if the decree is to be void and imperfect, and cannot be performed, a specific performance ought not to be decreed. And in *Brueggeman v. Jurgensen*, 24 Mo. 87, it was held that there was no equity for specific performance of a contract to convey land where the party against whom such equity is asserted has rendered a specific execution on his part impossible by conveying said land to a third person. And *Morse v. Elmendorf*, 11 Paige Ch. 277, is to the same effect.

In fact, our attention has not been called to a single case in which the vendee obtained any relief where the vendor was without title at the commencement of the suit, and the vendee knew the state of the title at the time. We think probably the plaintiff in this case is entitled to recover back the money, with interest, which she paid on the contract, as well as for permanent improvements on the premises after she went into possession; but we are unable to satisfy ourselves that we have any authority to consider or decide that question in this case. The authorities seem to be to the effect that the only decree we can render in such case is to dismiss the suit, leaving the injured party to pursue such remedy at law as he may be advised. (*Morse v. Elmendorf*, *supra*; *Hill v. Fiske*, *supra*; *Kempshall v. Stone*,

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5 Johns. Ch. 193; Pomeroy Spec. Perf. Contr. § 475; Waterman Spec. Perf. Contr. § 516.)

These conclusions would lead to an affirmance of the decree, but my associates think the case may be treated as a suit to redeem. As to that I express no opinion, but reverse the decree and remand the cause to be further proceeded with in accordance with the opinion of my associates.

BEAN, J.—I am of the opinion; that while in form this is a suit for the specific performance of the contract of sale from Mrs. Owens Adair to Mrs. Rodney Adair, it is in effect nothing more than a suit for the redemption of the land from the lien of her mortgage, and to declare the lien discharged and the mortgage satisfied. (*Miller v. Thayer*, 74 Cal. 351.)

The facts are fully set forth in the complaint, and to my mind clearly show a case for equitable relief, which should be granted in this suit. The transaction between the parties, it is conceded, amounted to nothing more than a security for the payment of the debt of Samuel D. Adair to Mrs. Owens Adair; and the agreement on her part to re-convey the land to Mrs. Rodney Adair, by his direction upon payment of the debt, did not in any way change the nature of the transaction, or make it any the less a mortgage. Equity looks to the substance, and not to the form; and "if a transaction resolves itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." (*Flagg v. Mann*, 2 Sumn. 486.)

While the agreement of Mrs. Owens Adair to convey the land to Mrs. Rodney Adair, upon the payment of Samuel D. Adair's debt, cannot, in the strict sense of the term, be denominated a defeasance, it is a means mutually agreed upon by the parties whereby the representative of the original grantor could recover what was justly his own. The terms upon which redemption might be had were

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somewhat modified, it is true, and some new features were introduced, but the essential character of the obligation resting upon Mrs. Owens Adair, who held the lands only as security, to restore them to the rightful owner, or his representative, upon payment of the debt for which they stood pledged, was unchanged. I think the parties had a right to substitute Mrs. Rodney Adair for Samuel D. Adair, and the fact that an obligation for a re-conveyance ran to her instead of him, is wholly immaterial (1 Jones, Mortg. § 241; *Flagg v. Mann*, 2 Sumn. 486; *Jeffery v. Hursh*, 58 Mich. 246; *Martin v. Pond*, 30 Fed. Rep. 15; *Pardee v. Treat*, 82 N. Y. 385.)

But whether this be true or not, is of no consequence in this suit; for he is a party plaintiff, and asking relief herein, and will be bound, so far as the defendant is concerned, by any decree which may be made. As the case is presented, it is conceded that the defendant Mrs. Owens Adair only has a lien upon the land to secure the payment of a certain sum of money, which was duly tendered to her before the commencement of this suit, and that the only persons who can claim the right to redeem or to a re-conveyance from her are joined as plaintiffs and demanding relief herein; and yet it is said they are without relief in a court of equity, because the defendant does not have the legal title to the land which she agreed to convey. We have nothing to do with the legal title, or whether Mrs. Owens Adair can convey a perfect or any title, but the question here is, whether she shall be compelled to accept the amount of the debt for which she holds the land as security and release or discharge her lien by re-conveying her interest if any in the land to the party to whom she agreed to so re-convey. I am clearly of the opinion she should; and this case ought to be reversed and remanded to the court below, so that the questions of fact, if any, can be tried out.

Opinion of the court—BEAN, J.

[Filed March 22, 1892.]

ABE MEIER ET AL. v. P. KELLY ET AL.

EQUITY—CLOUD ON TITLE—STATUTE OF LIMITATIONS.—A suit by the owner in fee to determine an adverse claim to, or interest in, real property, or to remove a cloud from the title thereof, cannot be barred by the statute of limitations while the adverse claim or cloud exists, because the right to have the same removed is a continuing right.

JUDGMENT LIEN—HOSTILE EQUITIES—REFORMATION OF MORTGAGE.—A judgment lien attaches only to the actual and not to the apparent interest of the judgment debtor in land, and is subject to any equitable estate therein hostile to the judgment debtor existing at the time the judgment was rendered, whether known to the judgment creditor or not; and for the purpose of protecting such equitable estate, courts of equity will correct a mistake in a mortgage upon which the equitable estate depends, and, as corrected, give it priority over a subsequently acquired judgment, so that the judgment lien will be confined to the actual interest of the judgment debtor in the land.

UNRECORDED CONVEYANCES—JUDGMENT LIEN—EQUITABLE TITLES.—Section 271, Hill's Code, which provides that a conveyance of real estate, or any interest therein, shall, as against the lien of a judgment, be void unless recorded, applies to conveyances which, if recorded, would give notice, but does not apply to the equities of plaintiffs, which require the aid of a court to establish.

Multnomah county: L. B. STEARNS, Judge.

Defendants appeal. Affirmed.

Sidney Dell, for Appellants.

H. B. Nicholas and *L. L. McArthur*, for Respondents.

BEAN, J.—This is a suit to determine an adverse claim to real estate, and is before this court the second time for adjudication. (*Meier v. Kelly*, 20 Or. 86.) The facts are that in February, 1876, one C. M. Carter borrowed of Catherine Quinney, one thousand two hundred dollars, for which he executed his note, due one year after date, and intending to secure the payment of the same by mortgage upon the southeast quarter of subdivision twenty-six of block C, of Carter's addition to the city of Portland, executed to her a mortgage; but by mutual mistake of the parties the property was described as lots three and four in block

22	136
32	18
32	136
34	103
22	136
48	358

twenty-six, Carter's addition. This mortgage was on the same day duly recorded in the proper record of Multnomah county. In June, 1876, the defendants' assignors, without any notice or knowledge of this mortgage, or Mrs. Quinney's equities, and so far as this record shows, without knowledge that Carter owned or had any interest in the property intended to be mortgaged, obtained their judgments against Carter, and duly docketed the same in the judgment lien docket. In 1878, the Quinney mortgage was foreclosed, the judgment lien creditors being parties to the suit, and Mrs. Quinney became the purchaser, and on July 30, 1880, received her deed from the sheriff, the property being described in the foreclosure proceedings and sheriff's deed the same as in the mortgage. Afterwards and in 1880, on account of the confusion or mistake in the description in the mortgage, she obtained from Carter's assignee in bankruptcy, by order of the bankrupt court, a deed properly describing the property intended to be mortgaged.

The plaintiffs by proper conveyances have succeeded to all the interest of Mrs. Quinney in the property and mortgage, and by the deed from Carter's assignee and a deed from Carter himself, executed in 1888, are now the owners in fee of the property. This property is now, and has been since the date of Mrs. Quinney's mortgage, vacant and unoccupied, but plaintiffs and their predecessors in interest have exercised acts of ownership over it, such as grading streets, removing fence, paying taxes, etc. The defendant Kelly, as sheriff of Multnomah county, under an execution issued February 23, 1891, upon the judgment in favor of Mrs. Fleurot, defendant Dell's assignor, has seized and levied upon said land, and was threatening to sell the same thereunder, when this suit was commenced to enjoin such sale, and for the determination of the rights of the parties. The court below made and entered a decree in plaintiff's favor reforming and reforeclosing the mortgage from Carter to Mrs. Quinney; and ordering the property sold, the pro-

Opinion of the court—BEAN, J.

ceeds thereof to be applied to the payment of the costs and disbursements of this suit and the amount due on the Quinney mortgage, and second, to the payment of the judgments of defendants according to their priority. From this decree the defendants appeal.

The contention of defendants on this appeal is, that this is a suit to reform and foreclose a mortgage dated February 16, 1876, upon which no payments have been made, and is therefore barred by the statute of limitations, under section 5, Hill's Code, or if this be not so, their judgments, having been obtained without notice of the equities of Mrs. Quinney, are liens prior and paramount to the equitable lien of the Quinney mortgage. Of these questions in the ordered suggested.

Under the decision of this court in *Anderson v. Baxter*, 4 Or. 105, a suit to foreclose a mortgage operative as such, and upon which suit may have been brought within the period of limitation, is a suit upon a sealed instrument within the meaning of section 5, Hill's Code, and if no payments have been made thereon, is barred within ten years; but this is not a suit upon such an instrument, it being one by the owner in fee and in the possession of property to enforce an equity in his favor against a person attempting to assert some interest or estate therein adverse to him, which equity arises out of a fact requiring testimony to disclose and a court of equity to establish. It is in the nature of a suit by the owner in fee to determine an adverse claim to, or interest in, real estate, or to remove a cloud from the title. In such case, the suit is never barred while the adverse claim or interest exists. While the owner in fee continues liable to an action, proceeding, or suit upon the adverse claim, he has a continuing right to the aid of a court of equity to ascertain and determine the nature of such claim and its effect upon his title, or to assert any superior equity in his favor; and a suit by him for this purpose cannot be barred by the statute of limita-

Opinion of the court—BEAN, J.

tions, because it is a continuing right. (*Miner v. Beekman*, 50 N. Y. 337; *Schoener v. Lissauer*, 107 N. Y. 111.) Plaintiffs are not only the owners in fee of the property against which the defendants are seeking to enforce their judgments, but are also in equity the owners of the Quinney mortgage and all equities existing in her favor arising out of the mistake in the description. These interests a court of equity will consider separately and not as merged, if necessary to preserve the priority of the equity over the intervening lien of defendants. (Harris, Subrogation, § 704.) Plaintiffs could safely rely upon their legal title and were not bound to assert their equity arising from the Quinney mortgage until an attempt was made to enforce the lien of defendants. But when this was done, the aid of a court of equity became necessary to prevent the priority of defendant's lien, and as long as their lien continued a suit for this purpose was not barred by the statute of limitations.

As a general rule, unless otherwise provided by statute, a judgment lien only attaches to the actual and not the apparent interest of the judgment debtor in land, and is subject to all equities which were held against the land in the hands of the judgment debtor at the time the judgment was rendered, whether known to the judgment creditor or not. When called upon in a proper case, courts of equity are always ready to protect the rights of those who hold such equities as against the judgment lien and to confine the latter to the actual interest of the judgment debtor. For this purpose they will correct a mutual mistake in the description in a mortgage, and as corrected give it priority over a subsequently acquired judgment. (Black, Judgments, § 445; Freeman, Judgments, §§ 356, 357; *Sweet v. Jacocks*, 6 Paige Ch. 355; 31 Am. Dec. 352; *Churchill v. Morse*, 23 Iowa, 229; 92 Am. Dec. 422; *Peck v. Williams*, 113 Ind. 256; *Baker v. Morton*, 12 Wall. 150; *Bush v. Bush*, 33 Kan. 556.) In *Snyder v. Martin*, 17 W. Va. 276; S. C. 41 Am. Rep. 670, after a careful exami-

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nation of the authorities, it is said: "It may, therefore, be laid down as a universal rule established by many cases, that a judgment lien is always subject to every possible description of equity held by a third party against the debtor at the time the judgment lien attached; and that it is immaterial whether the rights of such third party consist of an equitable estate or interest in the judgment debtor's land, an equitable lien on his land or a mere equity against the debtor which attaches to or affects his land. Nor is it at all material whether the judgment debtor has or has not, when he contracted his debt, or obtained his judgment, or docketed the same, notice of such equitable estate, equitable lien, or mere equity. If they be prior in time to the judgment, they will always be preferred to the judgment lien. The authorities we have cited abundantly sustain this conclusion and there is no exception to this universal rule, except where such exception has been made by some statute law."

A judgment lien creditor, until the levy of an execution issued thereon, can in no sense, either as a fact or by statute in this state, stand in the position of an innocent purchaser for value. His lien is a mere gratuity, conferred by law, for which he pays nothing, and only confers the right to levy upon the land to the exclusion of other adverse interests acquired subsequently to the judgment. Its office is not to create an estate nor to interfere with or affect prior equities, but is merely a general lien securing a preference over subsequently acquired interests in the property. It is not the result of a levy or any direct act against the specific property, but a mere gratuity conferred by statute, and independently of statute law is a charge upon the precise interest which the judgment debtor has and upon no other. The apparent interest of a debtor can neither extend nor restrict the operation of the lien so that it shall encumber any greater or less interest than the debtor in fact possesses.

The only exception to this rule in this state is made by

section 271, Hill's Code, which provides that "a conveyance of real property or any interest therein shall be void as against the lien of a judgment, unless such conveyance be recorded at the time of docketing such judgment or transcript thereof, as the case may be, or unless it be recorded within the time after its execution provided by law as between conveyances for the same real property." It is by virtue of this section defendants contend that the lien of their judgments obtains a priority over plaintiffs' equities. The language of this section is plain and explicit, and no argument can add to its force or meaning. It is clearly intended to apply only to conveyances which if recorded would give notice and not to equities which require the aid of a court of equity to establish. The language used by the legislature is of clear and definite import, and the courts cannot put a construction upon it which amounts to holding that the legislature did not intend what it actually expressed. When the legislature used the word conveyance, it evidently intended an instrument operating as such, and not some equity resting on parol and which is not entitled to record. (*Floyd v. Harding*, 28 Grat. 401; *Shipe v. Repass*, 28 Grat. 716; *Snyder v. Martin*, *supra*.)

The object of the statute is to require parties holding conveyances to put them upon record, and for a failure to do so subject their interests to the liens of subsequently acquired judgments. But in many cases the equitable interest is not capable of being recorded, and no laches can be imputed to the holder because it does not appear of record. The vendee or mortgagee is often deprived of his deed of mortgage by the fraud of the vendor or mortgagor or by the mutual mistake of the parties, or by death or sickness, or some controversy in regard to the precise terms of the contract, and at last is often compelled to resort to a court of equity for redress. Such cases are constantly recurring, and the books abound with them. The statute was never intended to apply to cases of this character and

 Points decided.

to hold that they come within its provisions is to hold that one man's property shall be taken for the debt of another, without the fault or neglect of the owner, and without the possibility of guarding against it by the exercise of the greatest diligence. It is not susceptible of any such construction without doing violence to its express language.

The statute nowhere provides that a judgment shall be a lien upon the property of the judgment debtor as it appears of record, but only upon the property of the defendant. Section 269, Hill's Code, is extended by section 271 to such property as he may have conveyed away and the conveyance is not of record.

The mortgage in this case from Carter to Quinney was inoperative as a conveyance because of the misdescription, (*Mcier v. Kelly*, 20 Or. 86,) but it was recorded; and when reformed by a court of equity becomes operative as a conveyance and stands recorded as against subsequent lien holders. It is not a new but the old mortgage which is reformed and that is recorded.

The decree of the court below is therefore affirmed.

 [Filed March 22, 1892.]

STATE OF OREGON EX REL. v. M. C. GEORGE ET AL.

CONSTITUTIONAL LAW—EXECUTIVE AND LEGISLATIVE FUNCTIONS—APPOINTMENT TO OFFICE.—The power of appointing officers does not belong exclusively to the executive branch of the government of this state, but may be exercised in some instances by the legislative assembly.

"MEUSSDORFFER ACT"—**BRIDGE COMMITTEE.**—The members of the bridge committee, provided for by the act of February 18, 1891, of the legislative assembly of Oregon, commonly known as the "Meussdorffer Act," are not officers within the meaning of that term as used in the constitution of this state; but are mere agents of the city of Portland for the performance of certain duties defined by the act.

DELEGATION OF LEGISLATIVE POWER—JUDICIAL FUNCTIONS.—It is not a delegation of legislative power for the legislature to authorize certain judges of the circuit court to appoint the bridge committee provided for by the "Meussdorffer Act"; neither is the exercise of this power of appointment by such judges in derogation of their duties as judicial officers.

92	143
97	406
128	559

23	142
34	28
22	142
41	514

Statement of the case.

MEMBER OF LEGISLATURE—OFFICE CREATED BY LEGISLATIVE ASSEMBLY—

ELIGIBILITY.—A person who was a member of the legislative assembly which passed the "Meussdorffer Act," is not thereby disqualified to serve, during the term for which he was elected, as a member of the bridge committee created by the act, because such a position is not an office.

Multnomah county: E. D. SHATTUCK, Judge.

Plaintiff appeals. Affirmed.

This was a proceeding in the nature of a *quo warranto* brought by the state upon the relation of D. F. Sherman, a citizen and taxpayer, to try the title of the respondents to hold the office of bridge committeemen, under the act of the legislative assembly, commonly known as the Meussdorffer Act.

By section 2 of said act, it is provided that the power and authority given to the cities named in section 1 hereof, since consolidated as the city of Portland, to construct, purchase, hire, keep up and maintain bridges across the Willamette river, and to issue and dispose of bonds therefor, shall be exercised as hereinafter provided, by eight taxpayers of Multnomah county, to be appointed by the two judges of the circuit court for said county, who shall be styled the bridge committee. The act then directs that within thirty days after the time it takes effect, it shall be the duty of said judges to appoint the committee referred to in section 2, and to cause notice of such appointment to be served on each person appointed. Within twenty days after notice of their appointment, the members of the committee are directed to meet and organize by the election of a presiding officer from their number who shall be styled the chairman of the committee, by the selection of a clerk who shall be styled the clerk of the committee, and the appointment of a treasurer. The committee thus constituted is authorized to fill any vacancy that may occur in that body by death, resignation, removal from the city of which he is a resident, or otherwise, by appointment of a person to be a member thereof who is a *bona fide* resident

Statement of the case.

of the city in which resided the member he is appointed to succeed. Whenever, and in the judgment of the committee, as soon as the several bridges are procured as contemplated, or the limit of the sum of money authorized to be expended has been reached, the act commands the selection of four persons, whose duty it shall be to maintain, manage and keep the bridges in repair. These shall be styled individually bridge commissioners, and collectively the bridge commission; and thereafter the power conferred upon the city by the enactment named shall be exercised by said commission in the manner explicitly provided. These commissioners are to be selected in the first instance by the committee from their own number, one each from the members who reside respectively in the cities of East Portland and Albina, and two from members who reside in the city of Portland, for the several terms of two, four, six, and eight years. In case a sufficient number do not consent to serve as such commissioners, the remainder may be selected from the resident taxpayers of the respective cities, and thereafter the commissioners shall be appointed by the said judges from such taxpayers in the following manner: If a vacancy arise otherwise than by the expiration of a term, for the remainder of the term; and in case of the expiration of a term, for the full term of eight years thereafter.

The commission is required to meet at a time and place to be appointed by the committee, and organize by the election of a chairman, treasurer, and clerk, as provided in the case of the committee. When the commission is elected and organized in accordance with the intention of the law, the committee is directed to turn over to it the bridges and all property pertaining thereto and remaining under the control of the committee. It is then made the duty of the commission to take entire possession and charge of all of the property and affairs of the committee, and thenceforward manage and conduct the same.

Statement of the case.

The two judges of the circuit court of the state of Oregon for Multnomah county, acting in pursuance of the authority conferred by the terms of said act, and within the time therein limited, duly appointed the respondents to the position of bridge committeemen, making the selection of the different individuals with reference to their places of residence and other qualifications prescribed. The committeemen met within the proper time, qualified and organized in all respects in conformity with the law. On the eighteenth day of November, 1891, John M. Pettinger resigned. The remaining seven members of the committee, at a meeting duly called, appointed as his successor T. W. Pittinger, who possessed the requisite qualifications.

After reciting these and other facts the petition then alleges, "That the defendants to this action and all and each of them, ever since their said appointment as aforesaid, and under said appointment, have acted as and claimed to be and are now acting as and claiming to be the bridge committee of said three cities, etc., as the same existed prior to said consolidation, and as the same now exists and has existed since said consolidation; and that said defendants, claiming to be said bridge committee, are about to issue, sell, and dispose of a large amount of the negotiable bonds, etc., as provided for in said free bridge act, which said bonds will be a burden upon the property of the above-named relator and the other citizens and taxpayers of the present city of Portland, and subject them to expensive litigation in order to prevent the assessment and collection of taxes upon their property for the payment of the principal and interest of such bonds," etc., concluding with a prayer for a judgment of ouster.

The defendants demurred to the petition upon the ground of the insufficiency of the facts to constitute a cause of action. The demurrer was sustained by the court below, and judgment rendered dismissing the action, from which judgment this appeal is taken.

Argument of counsel.

T. A. Stephens, district attorney, and *Paxton & Paddock*, for Appellants.

A citizen of a city has such an interest in its municipal offices as will support *quo warranto* to test the right of an incumbent thereto. The relator was authorized to institute this action. (*State v. Hammer*, 42 N. J. L. 435; *Churchill v. Walker*, 68 Ga. 681; *State v. Jenkins*, 25 Mo. App. 484.)

The members of the bridge committee are officers within the meaning of the statute authorizing the action in the nature of *quo warranto*. This action will lie to determine whether they are entitled to the office. (*Palmer v. Woodbury*, 14 Cal. 44; High Ex. Rem. §§ 625, 626; *People v. R. & S. R. R. Co.* 30 Am. Dec. 47, note.)

Commissioners appointed by act of the legislature to lay out and build a road for the use of the public are public officers. An office is a public charge or employment, and every office is considered public the duties of which concern the public. (*People v. Hays*, 7 How. Pr. 248; *U. S. v. Hartwell*, 6 Wall. 385; *State v. Kennon*, 7 Ohio St. 547; *State ex rel. v. Valle*, 41 Mo. 29.)

The two judges of the circuit court of the state of Oregon for the county of Multnomah, no matter whether they are referred to in the Meussdorffer Act as individuals or as judicial officers, are "persons charged with official duties under" the judicial department of the government, and by the terms of this constitutional provision are prohibited from exercising any of the functions of either of the other departments. (*State ex rel. v. Denny*, 118 Ind. 449; *State ex rel. v. Denny*, 118 Ind. 382; *State v. Simons*, 32 Minn. 540; *Houston etc. R. R. Co. v. Randolph*, 24 Tex. 317; *People v. Albertson*, 55 N. Y. 55.)

The act of appointing to office is not a judicial duty, nor is it a function pertaining to the judicial department of the government. It is an administrative function, and no matter by whom exercised, is in its nature an executive act, and ordinarily, excepting in cases where the power is

Argument of counsel.

lodged elsewhere by the constitution, can be exercised by the executive department only. (*Mechem, Public Officers*, §§ 104-106; *Heinen v. Sullivan*, 64 Cal. 378; *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65; *Taylor v. Comw.* 3 J. J. Marsh. 401; *People v. Nichols*, 68 N. C. 429; *State v. Tate*, 68 N. C. 546.)

Even though the legislature may exercise the power of appointment as to such state officers of general authority, it has not power to make permanent appointments to fill purely local municipal offices, nor to invest such appointees with authority to tax or impose indebtedness upon the district for which they are appointed. (*Evansville v. State*, 118 Ind. 426; *People v. Hurlburt*, 24 Mich. 44; 9 Am. Rep. 103; *People v. Detroit*, 28 Mich. 228; 15 Am. Rep. 202; *People v. Chicago*, 51 Ill. 17; 2 Am. Rep. 278; *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *People v. Albertson*, 55 N. Y. 55; *People v. Porter*, 90 N. Y. 68; *Mechem, Public Officers*, § 106.)

It is a settled maxim of constitutional law that the legislature cannot delegate the powers conferred upon it. Matters entrusted to the judgment, wisdom and patriotism of the legislature cannot be by it delegated to other agencies. It cannot substitute the judgment, wisdom, and patriotism of any other body for its own. (*Cooley, Const. Lim.* 6 ed. 137; *Thorne v. Cramer*, 15 Barb. 112; *Bradley v. Baxter*, 15 Barb. 122; *Barto v. Himrod*, 8 N. Y. 483; 59 Am. Dec. 506; *Willis v. Owen*, 43 Tex. 41; *Brewer Brick Co. v. Brewer*, 62 Me. 62; 16 Am. Rep. 395; *State v. Hudson Co. Coms.* 37 N. J. L. 12; *Auditor v. Holland*, 14 Bush. 147; *State v. Simons*, 32 Minn. 540.)

Upon the like principle it is held that the legislative body of a municipal corporation cannot delegate to any other officer or agency the powers entrusted to it. (*City of Oakland v. Carpentier*, 13 Cal. 540; *State v. Mayor*, 34 N. J. L. 163; *Ruggles v. Collier*, 43 Mo. 353; *City v. Clemens*, 43 Mo. 395; *Thomson v. Mayor*, 61 Mo. 282; *Whyte v. Nashville*, 2 Swan, (Tenn.) 364; *Maxwell v. Bay City Bridge Co.* 41 Mich. 453.)

The office is one which the legislative assembly had power to and might have filled by appointment or elec-

Argument of counsel.

tion, and therefore is an office the election to which is vested in that body. Instead of exercising this power, the legislature delegated it to the judges. The legislature itself, of which he was a member, could not have appointed Mr. Meussdorffer a member of the committee. Can the power of the agent exceed that of the principal? (*State v. Boyd*, 21 Wis. 210; *State v. Valle*, 41 Mo. 29.)

William T. Muir, city attorney, for Respondent.

The entire law-making power of this state is committed to the legislature, except so far as it is expressly or by necessary implication limited by the constitution. (Cooley's Const. Lim. 5 ed. 106, 107; *David v. Portland Water Committee*, 14 Or. 98.)

The constitution broadly separates the powers of government into three branches. It does not undertake to declare what shall be considered a legislative, executive, or judicial act. The authority to appoint municipal and other officers is not given to either department. In the absence of any express declaration to the contrary, the power is merely ministerial, and the legislature may confer it in particular instances upon persons holding judicial office. (Constitution, art. 3, 1 Hill's Code, § 86; *People ex rel. v. Morgan*, 90 Ill. 558; Illinois Const. Art. 3, Starr & Curtis Stats., 109; Cooley's Const. Lim. 5 ed. 135; *McArthur v. Nelson*, 81 Ky. 67; Kentucky Const. Art. 1, §§ 1, 2, Genl. Stats. 91; *People ex rel. v. Solomon*, 51 Ill. 39; *Mayor v. State*, 15 Md. 376; 74 Am. Dec. 572; *Police Comrs. v. Louisville*, 3 Bush, 597; *People v. Pinckney*, 32 N. Y. 377; *People v. Batchelor*, 22 N. Y. 129; *People v. Woodbury*, 14 Cal. 43; Const. Cal. Art. 3, 1 Deering's Stats. 36; *State ex rel. v. Swift*, 11 Nev. 128; *Bridges v. Shallcross*, 6 W. Va. 562; *People v. Osborne*, 7 Colo. 605; Opinion of Justices, 138 Mass. 601.)

Our constitution allows much latitude in the matter of appointments to office, and permits the power to be exer-

Opinion of the court—LORD, J.

cised by different branches of the governing power. (Art. 15, § 2, Hill's Code, 112; Art. 5, § 16, Id. 97.)

The legislature of the state has repeatedly exercised the appointing power in a manner similar to the method adopted in this case. (Laws Sp. Session, 1885, 97; Laws, 1887, 30; Laws, 1891, 791.)

Great weight should be given to contemporaneous construction. (Cooley's Const. Lim. 5 ed. 81, 82; *Mayor v. State*, 15 Md. 377; 74 Am. Dec. 572; *Biggs v. McBride*, 17 Or. 640.)

This interpretation of the constitution by the legislature has been upheld by this court. (*David v. Water Committee*, 14 Or. 98; *Biggs v. McBride*, 17 Or. 640; *Cook v. Port of Portland*, 20 Or. 580.)

The correct interpretation of article 3 of the constitution of this state is that no person employed in one department of the government shall at the same time be employed in either of the other two. (*People v. Provines*, 34 Cal. 520; Const. Cal. Art. 3; 1 Deering's Stat. 36.)

The position of bridge committeeman is not an office within the meaning of the constitution. He is a mere agent of the city. (*David v. Water Committee*, 14 Or. 99; *Barton v. Kalloch*, 56 Cal. 95.)

The phrase elected or appointed does not refer to municipal officers. (*Barton v. Kalloch*, 56 Cal. 95; *People v. Provines*, 34 Cal. 520; *People v. Henry*, 62 Cal. 557.)

Nor is the office one of profit. He serves without compensation. (Laws, 1891, 634 *et seq.*)

LORD, J.—The question presented for our determination arises upon the sufficiency of the facts to show whether or not the defendants are entitled to hold the office of bridge committee and to exercise the functions thereof. The aim of the proceeding is to test the constitutionality of the method provided by the act, (Laws, 1891, 633,) commonly known as the Meussdorffer Act, for the appointment of the bridge committee. It is insisted that the facts alleged

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show that the defendants are holding the offices of bridge committee, and exercising the functions thereof without title or legal right, because the two judges of the circuit court for Multnomah county, referred to in the act, are prohibited by article 3 of the constitution from exercising the appointing power, or any function other than judicial. This proceeds upon the assumption that the act of the two judges of the circuit court in appointing the bridge committee was not a judicial duty, nor a function pertaining to the judicial department of the government. By article 3 of the constitution, the powers of the government are divided into three separate departments,—the legislative, the executive, including the administrative, and the judicial,—and any person charged with official duties under one of these departments is prohibited from exercising the functions or powers confided to either of the other departments, except as in the constitution expressly provided.

It is claimed that the two judges of the circuit court, no matter whether they are referred to in the Meussdorffer Act as individuals or judicial officers, are persons charged with official duties under the judicial department of the government, as the members of the legislature are under the legislative department, and that this constitutional provision prohibits the legislature from conferring upon such judges, and such judges from exercising, the power of appointment conferred by the act, and hence such act, and all appointments under it, are void. There can be no doubt that there are authorities to the effect that the exercise of the power of appointment to office is an executive act, and that being such the power cannot be exercised by the legislature or judiciary under a constitutional provision distributing the powers of government into three separate departments like our own. But this question, although not directly passed upon by the court in *Biggs v. McBride*, 17 Or. 640, nevertheless received a good deal of its attention. The point was there made that so much of the act creating the offices

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of railroad commissioners as undertook to fill them by an election in joint convention of both houses of the legislature was in conflict with the constitution and void. After referring to article 3 and section 1 of article 5 of the constitution, STRAHAN, J., said: "Now, if it could be shown that the power to appoint all officers which are not expressly made elective by the people, is a part of the chief executive power of the state, the appellant's contention would be sustained, but no authority whatever has been cited to sustain this view, nor is it believed that any exists. On the contrary, the provisions of the fifth article of the constitution, which relates to the executive department, all seem at variance with this view. The framers of this instrument evidently designed that no prerogative powers should be left lurking in any of its provisions. No doubt they remembered something of the history of the conflicts with prerogatives in that country from which we inherited the common law. They, therefore, defined the powers of the chief executive of the state so clearly and distinctly that there ought to be no controversy concerning the method of filling the same, or in some cases of changing the method of filling an existing office." After proceeding to enumerate several instances in which the power had been exercised by the legislature in making these appointments of office, which were in no way connected with the discharge of legislative duties, he concluded his opinion on this point by saying: "The power exercised by the legislature in the appointment of some of these officers is almost coëval with the constitution. The power thus exercised has never been called into question, but has been acquiesced in by every department of the government, and is in itself a contemporaneous construction of the constitution, which, if the question were doubtful, might be sufficient to turn the scale in its favor. Under any view such construction is entitled to great weight and could not be lightly regarded;

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Except as limited by constitutional restrictions, it is agreed that the legislature may exercise all governmental powers. It is the law-making power of the state. "Plenary power in the legislature," said DENIO, J., "for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception." (*People v. Draper*, 15 N. Y. 543.) While our constitution separates the powers of government into three distinct departments, and prohibits any of them from exercising any powers confided to the other, it does not undertake to declare what shall be considered legislative, executive, or judicial acts. As WALKER, J., said: "That provision declares, only in general terms, that each department of government shall be confined to the exercise of the functions of its own department. It does not undertake to define in any specific manner what are legislative, executive, or judicial powers, or acts. Like most other provisions of that instrument, the terms employed are of the most general and comprehensive character. We find no provision that declares that the appointment of a municipal officer, however extensive his powers, is the exercise of a legislative or executive power." (*People ex rel. v. Morgan et al.* 90 Ill. 562.)

But it is argued that if it be conceded that *Biggs v. McBride*, *supra*, established the principle that the legislature, in the appointment of the railroad commissioners, had not encroached upon the executive department of the government, they were state officers, charged with official duties to be exercised for the benefit of the state at large, and appointed for a fixed term, while the members of the bridge committee, provided for by the Meussdorffer Act, are municipal officers, or a municipal board of local authority, in which the state generally has no interest and appointed for an indefinite term. Hence, it is claimed, even though the legislature may exercise the power to appoint such state officers of general authority, that it has not the power to make appointments to fill municipal offices for an indefi-

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nite term. But it seems to us the force of this contention is broken by the case of *David v. Portland Water Committee*, 14 Or. 98. The duties of that board or committee in principle were like the duties of the defendant bridge committee. If the members of the water committee were not officers in the sense of the constitution, but "no more than agents of the city," as held in that case, the members of the bridge committee must likewise be agents for the city, and not officers, within the meaning of the constitution. It would be difficult to show upon principle by a comparison of the acts wherein they differ that the members of the water committee are agents, and the members of the bridge committee officers. That the persons named by the act as the bridge committee, were, as THAYER, J., said of the individuals designated as the water committee, "officers, in the broad sense of that term, there can be no question; but whether they were such officers as were intended by said section 3, article 15, of the constitution, is very doubtful. In order to be such officers, they must have been elected or appointed to an office under the constitution, which I understand to be an office provided for by that instrument." The same would be true of the bridge committee so far as this section of the constitution applies. But the court, in *David v. Water Committee, supra*, based its decision upon the principle decided in *McArthur et al. v. Nelson*, 81 Ky. 67. In that case, the act authorized the judge of the circuit court to appoint three commissioners of the district, who should hold their office at the will and pleasure of the judge. It was made the duty of the commissioners to have constructed a court-house at a cost of not to exceed a sum specified; and to enable them to raise the money, they were authorized to issue bonds, to redeem them, and to levy an annual tax upon the real and personal property of the district. In determining the question as to whether such commissioners were officers or not under the constitution, PRYOR, J., said: "Nor do we think it was necessary

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for the legislature to prescribe the term of office for the commissioners, although they are made a body corporate and politic, with power to sue and be sued, contract and be contracted with, under the style of 'Commissioners of the Court-house District.' They are not district officers within the meaning of section 10 of article 6 of the constitution, but are mere agents of the district, required by the act to discharge certain duties with reference to the building of a court-house, and when those duties end, their employment terminates. * * * To hold that such commissioners are to be selected, and when selected to be removed as officers, within the meaning of the constitution, would be determining by judicial precedent that every one charged with the execution of a ministerial duty under legislative sanction is an officer, whose term must be designated or the appointment will be held invalid."

In commenting upon that case, THAYER, J., said: "The question involved in that case is very similar to the one here, and the language of the court expresses the view we entertain regarding it,—that the members of the water committee are no more than agents of the city, required by the act to carry out its provisions, as was said in that case regarding the commissioners to build the court-house." Within the principle here decided, the vice of the argument for appellant lies in assuming that the members of the bridge committee are officers. Counsel proceed upon this hypothesis, but contend that being municipal officers of local or limited authority, their appointment by the legislature cannot be sustained; for their duties are not such as to affect the state at large, and cannot, therefore, be upheld, as in the case of the appointment of state officers to discharge duties in which the general public are interested. Moreover, if the members of the bridge committee are not officers but agents appointed to carry out the provisions of the act, the argument can have no application. In the absence of constitutional restrictions, the power of

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the legislature over municipal corporations is unlimited, except so far as they are endowed with rights incident to a private corporation. (Dillon, Mun. Corp. 3 ed § 66.) Counsel for the appellant, recognizing the effect of these decisions upon the pending question, and the practice of our legislature, coëval with the formation of the state government to create and fill a certain class of offices, further argue that if it be admitted that the legislature had power under these decisions, (*Biggs v. McBride, supra*, and *David v. Water Committee*,) not only to create the bridge committee, but to appoint the persons constituting the same, this power cannot be delegated by the legislature to the judges of the circuit court, to be exercised by them in the appointment of the members of the committee. It is, no doubt, true that the legislature cannot delegate the powers conferred upon it. The general rule of law to this effect is unquestioned. But this refers to the delegation of the law-making power. It prohibits the delegation of authority to legislate, or to devolve upon others duties which must be performed by it as a legislative body. Every law must be executed, if at all, by some one charged with that particular duty. Laws special in their nature and of the kind in question, as in *David v. Water Committee, supra*, may be carried into effect by agents appointed for that purpose. Within that decision nothing more or less has been done in this case. The legislature exercised its function in enacting the law, and directing the manner of its execution.

Nor is the authority given by the act to the two judges of the circuit court to appoint the members of the bridge committee even considered as officers, without judicial precedent to sustain it, as not in conflict with section 1 of article 3 of our constitution. In Illinois there is a like provision substantially. (Art. 3. Ill. Const. Starr & Curtis Stats. 109.) In *People v. Morgan*, 90 Ill. 558, the power of the judiciary to appoint certain officials, whose duties are not strictly judicial, or even connected with the business of

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the courts, was fully recognized and sustained. A statute of that state which authorized the judge of the circuit court of Cook county to appoint assessors and commissioners for the South Park, located in that county, was held to be constitutional. The point was expressly made, that the circuit judge could not appoint a park commissioner, on the ground that he was thereby exercising an executive or political function forbidden by the clause of the constitution referred to. The point was, however, overruled, and the power of the judge or judges to make the appointment was sustained. After giving numerous examples of official appointments made by the judges or courts, WALKER, J., said: "The executive power in a state is understood to be that power, where ever lodged, which compels the laws to be enforced and obeyed. The instrumentalities employed for that purpose are officers, elected or appointed, who are charged with the enforcement of the laws. But the power to appoint is by no means an executive function unless made so by the organic law or legislative enactment; and in this case it is not so unless the power is thus conferred. If it were conceded that these appointments were the exercise of political power, would it necessarily be violative of any provision of the constitution? The division and allotment of powers are not into political, executive, and judicial, but into legislative, executive, and judicial. It was no doubt the exercise of political power, as that embraces all governmental powers and functions, whether exercised by one department or another or the officers of one or the other. Political power is the policy of government or its administration, and may be exercised either in the formation or administration of government, or both. Hence it follows, that if it be a political power, that of itself in no wise militates against its exercise by a person belonging to the judicial department of the government. * * * All three departments aid in the administration of government, but perform different func-

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tions. The elector who votes for an officer or measure, exercises political power; yet no one would claim that because a judge was a person belonging to the judicial department, he was prohibited from thus voting. We, therefore, conclude that if the power to appoint to office is a political function, this article of the constitution does not prohibit its exercise because the power is political; and if prohibited, it must be for some other reason, or by some other provision which, in terms, or by necessary implication, prohibits such an exercise of the appointing power." And again he says: "But this is not a question as to what department these officers belong, or the functions they perform, but the question is, what department, in the absence of an election, can constitutionally confer the power on them to perform public duties. It is not whether the general assembly, the executive, or the judiciary are the best qualified to select and appoint such officers, but where is the power to do so lodged? The original power to fill all offices rests with the people, but our constitution has vested the power in the governor to fill all constitutional offices not provided for by election or otherwise."

In *People ex rel. v. Hoffman et al.* 116 Ill. 587; 56 Am. Rep. 793, it was held that section 1, article 2, of the election law of 1885 for cities, etc., which provides for the creation of a board of election commissioners, consisting of three members, and directs that they be appointed by the county court, is not violative of that provision of the constitution dividing the powers of government into three departments, and prohibiting any one of such departments from exercising powers properly belonging to either of the others. It was there urged that the appointment of the commissioners could not be conferred upon the county court, because such appointment involves an exercise of political power, while the functions of the county court are exclusively judicial. But MAGRUDER, J., said: "The reasoning in *People v. Morgan* shows that it was never intended to vest in the

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governor the selection of such local and municipal officers as these commissioners. The power to appoint officers of this class is not specifically designated in the constitution as either a legislative, judicial, or executive power. It is not therein specifically conferred on either department. Nor is there any thing therein expressed which, either directly or impliedly, prohibits the legislature from authorizing the county court to appoint the commissioners. Therefore, the authority conferred on that court to do so does not make the act invalid. The law-making powers of the states can do any legislative acts not prohibited by the state constitution."

A statute of the United States authorizes the circuit courts of the United States to appoint supervisors of elections in certain cases and under certain conditions therein specified. In *Ex parte Seibold*, 100 U. S. 371, the point was made that the United States circuit courts had not the power to appoint supervisors of election, on the ground that the duties of such courts were judicial, while the supervisors of election were officers whose duties were executive in their character. But the court held otherwise, Mr. Justice BRADLEY saying: "It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such office appertain. But there is no absolute requirement to this effect in the constitution; and if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of marshal, for instance. He is an executive officer, whose appointment is in ordinary cases left to the president and the senate. But if congress should, as it might, vest the appointment elsewhere, it would be questionable whether it would be in the president alone, in the department of justice, or in the courts. The marshal is preëminently the officer of the courts; and in case of a vacancy congress has,

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in fact, passed a law bestowing the temporary appointment of the marshal upon the justice of the circuit in which the district where the vacancy occurs is situated."

But independent of these considerations, the power to appoint the bridge committee may be upheld on the ground that the two judges of the circuit court for Multnomah county in performing this duty act as individuals and not as judges. This conclusion the court thought in *People ex rel. v. Morgan et al. supra*, might be drawn from the act authorizing the circuit judges of Cook county to appoint park commissioners; WALKER, J., in speaking for the court, saying: "The power might, no doubt, be sustained on the ground that its exercise is the act of the individual and not the performance of an official function; that the act referring to the judge was only intended to apply to the person who filled the office at the time when the appointment was required to be made, whether it should be the same or a different person, thus being the individual act of the incumbent. * * * So that whether the appointment of these park commissioners be the exercise of a judicial, ministerial, or other function,—whether it be the act of the officer as such, or as an individual,—we are of the opinion that the power was well conferred and might be properly exercised by the circuit judge."

In view of these considerations, our decisions and those of other courts, and the power exercised by the legislature in making a certain class of appointments, almost coëval with the constitution, it is immaterial whether the appointment of the members of the bridge committee by the judges be considered the exercise of a judicial, ministerial, or other function, or it be the act of the judges as such, or as individuals, or whether the members of the committee be considered as agents of the city and not officers, the result is the same, and affirms the validity of the act granting the power.

Statement of the case.

The second question presented for our determination is whether the appointment of the defendant C. H. Meussdorffer as a member of the bridge committee is valid, he being a member of the legislature which passed the act. The contention of the appellant is that he was not eligible to be appointed a member of the bridge committee because such appointment is in conflict with section 30 of article 4 of the constitution. That provision is as follows: "No senator or representative shall, during the time for which he may have been elected, be eligible to an office, the election to which is vested in the legislative assembly," etc. Within the meaning of the constitution, as held in *David v. Water Committee*, under a statute of similar import, the position of bridge committeeman is not an office. He is a mere agent of the city. So that turn over this case as we may, keeping in view the well recognized rule that doubt must be solved in favor of the validity of the law, and that a law to be invalid must clearly conflict with the constitution, we must affirm the judgment.

[Filed March 22, 1892.]

STATE OF OREGON v. JOE DAY.

CRIMINAL LAW—INTIMIDATION OF WITNESS.—Before evidence can be received against a defendant in a criminal prosecution, of attempts to bribe or intimidate a witness for the state, the defendant must be shown to have authorized such attempts or be connected therewith.

Multnomah county: L. B. STEARNS, Judge.

Defendant appeals. Reversed.

The defendant was jointly indicted with one Chung Foo, for being armed with a dangerous weapon, and assaulting Sue Bing therewith, and upon a separate trial was convicted, from which judgment of conviction this appeal was taken.

Upon the trial in the court below, the defendant sought to impeach the prosecuting witness Sue Bing, by making it

Statement of the case.

appear that upon a preliminary examination had in the police court of the city of Portland, he testified that he did not know who it was that shot him, but that he had been informed that he was shot by Joe Day and Chung Foo. For that purpose, defendant's counsel asked Sue Bing, on his cross-examination, a number of times if he did not so testify in the police court. He remained silent, failing to answer either of said questions. The court then repeated said questions to the witness a number of times with the same result. The record then recites: "Here the district attorney admitted that the complaining witness Sue Bing did so testify in the police court." After some further questions, the court propounded this question to the witness. "Did you testify,—didn't you swear before Judge Carey in the police court when you were examined in this case down there,—didn't you say before the police judge you didn't know who shot you? Say yes or no." To which the witness answered, "Yes; I say I never see him before July second. I don't know him before that time." The court then repeated the question substantially, but failing to elicit an answer, he remarked to counsel: "You will have to ask the witness so he can understand your question." The district attorney then observed the reason he didn't testify in the police court was because he was afraid they would kill him, to which defendant's counsel objected, but did not take the ruling of the court upon the propriety of the district attorney's statement of the fact, nor was the same withdrawn. The witness continued: "At jail I tell Jack Rugg I was afraid; that is all." Question by the district attorney: "You no afraid now?" Answer—"They tell me they kill me and tell me to no tell who shoot me, and they say they give me eighty dollars not to tell who shoot me." Question by the district attorney: "Some one offered you eighty dollars if you would not say who shot you?" Answer—"Yes." Question by district attorney: "Can you tell who it was; what Chinaman it was?" Answer—"Yes." The witness here

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pointed out a Chinamen in the court room who, he said, offered him eighty dollars not to testify against Joe Day and Chung Foo in this case. Question by the district attorney: "What is his name?" Answer—"Choo Doo." Question by the district attorney: "What company does he belong to?" Answer—"I don't know." This part of the examination does not appear to have been objected to.

Ju Guy, a witness for the defendant, testified that he was present in the police court and heard Sue Bing testify. Among other things, he said he did not know who shot him; he did not know Chung Foo or Joe Day shot him. He said he never saw these two men.

The defense also called W. T. Hume, deputy district attorney, who said he conducted the examination in the police court. His evidence as to what occurred in the police court was the same in substance as Ju Guy's. Upon cross-examination, the district attorney asked the witness the following question: "You may state, Mr. Hume, whether or not he appealed to you for protection?" To which question defendant's counsel objected, which objection being overruled, an exception was taken and the witness answered, "Yes, sir; he made certain statements to me; he laid the facts before me, and then said he was afraid to testify."

H. E. McGinn, for Appellant.

T. A. Stephens, district attorney, for Respondent.

STRAHAN, C. J.—Several points in the evidence are set out in the statement, which indicate pretty clearly the course pursued by the prosecution throughout the trial, but the only contention made by the appellant on the appeal is error by the court in permitting the deputy district attorney to answer the question propounded to him on his cross-examination by the state. By that question the witness was required to state whether or not Sue Bing appealed to him for protection. The witness said in answer: "Yes, sir; he made certain statements to me; he laid the facts

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before me, and then said he was afraid to testify." It will be observed that by the question the witness is not required to state when or on what occasion, or under what circumstances this application for protection was made, nor against whom he was to be protected. The record does not disclose any threats or hostile movements on the part of the defendant, or any attempt to injure Sue Bing, and yet the case evidently went to the jury on the assumption that the defendant was in some way responsible for Bing's fears, when there is not a particle of evidence in the record tending to prove such fact or to justify such an inference. If the district attorney could have proven that the defendant attempted to bribe or to intimidate or to tamper with Sue Bing in any way so as to prevent him from testifying fully and freely upon the trial, such evidence would have been proper. It would have been competent, because from it the jury might have presumed that the evidence, if truly and freely given, would have been adverse to the party attempting to suppress it; but the simple fact that some one made the attempt without in any manner connecting the prisoner with such unlawful interference, is not enough. If the prisoner did not do it or authorize it, he is not responsible, and could not be prejudiced by such unlawful act. But in addition to this, no reason is perceived why the answer of the witness Hume is not within the rule of hearsay evidence referred to in *State v. Ah Lee*, 18 Or. 540. We fail to see on what rule of evidence the prisoner is to be affected or prejudiced by the solitary fact that the prosecuting witness told the deputy district attorney that he was afraid to testify. Why afraid? Not from any act or word of the defendant so far as the record discloses, and the record contains all the evidence given upon the trial.

For the reason indicated, the judgment must be reversed and a new trial awarded.

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[Filed March 29, 1892.]

RUDOLPH NEIMITZ v. PETER CONRAD ET AL.

FALSE IMPRISONMENT—VOID PROCESS—IRREGULARITIES—WAIVER.—A void process is no justification for an arrest, but one merely irregular or voidable is a complete defense until set aside; and where a defendant appears and puts in bail without moving to set aside such irregular or voidable process, he waives all defects in the manner of its issue.

ARREST—REGULAR PROCESS—IRREGULAR SERVICE.—The process of arrest being sufficient, the party who in good faith upon proper cause sues it out, is not responsible for irregularities in the manner of its execution, unless it affirmatively appear that the officer so acted by direction of the person suing out the writ.

FALSE IMPRISONMENT—PLEADING—VARIANCE.—Where the complaint charges false imprisonment by an arrest void *ab initio*, it is a material variance to admit evidence of an arrest lawfully made, but which afterward became unlawful imprisonment by reason of a refusal to receive bail.

Multnomah county: E. D. SHATTUCK, Judge.

Plaintiff appeals. Affirmed.

V. K. Strode, and B. M. Smith, for Appellants.

A. F. Sears, Jr., for Respondent.

BEAN, J.—This is an action for false imprisonment, brought here by plaintiff on appeal from a nonsuit entered against him in the court below. The record is in confusion, but from the bill of exceptions, interpreted in the light of the briefs and arguments of counsel, the facts appear to be that on August 22, 1891, defendants Conrad and Schafer commenced an action in a justice's court against plaintiff, on an account; and at the same time filed an affidavit and undertaking in due form for the arrest of plaintiff as an absconding debtor. A warrant of arrest was issued by the justice of the peace and placed in the hands of a deputy sheriff for service. The plaintiff was arrested and taken to the office of defendants' attorney, where arrangements were made for bail, and the attorney prepared a bail bond and gave it to the officer to be executed by the sureties. The undertaking was afterward signed by two sureties, and although not executed in the manner pro-

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vided by law, the officer discharged the plaintiff from arrest. A short time afterward, the attorney, learning of the action of the officer in discharging the plaintiff, caused another warrant to be issued by the justice and placed in the hands of the constable for service. Upon this warrant the plaintiff was again arrested, whether before or after midnight Saturday night does not clearly appear, and placed in jail until the following Monday, when he was taken before the court, and upon giving a proper undertaking, was discharged.

From this statement it appears that the court issuing the process under which plaintiff was arrested, had jurisdiction of the action and of the parties. The affidavit for the warrant set forth the necessary facts to authorize it to be issued. The proper undertaking was given, and there was a full compliance, so far as this record shows, with all the requirements of the law to justify the issuing of the process. The arrest was therefore under lawful process, and so long as it remained in force, was a complete justification to the defendants. The issuing of the second warrant was at most only an irregularity, and, until set aside, no action will lie for false imprisonment by reason of the arrest thereunder. A void process is no justification for an arrest, but an irregular and voidable one is a complete defense until set aside. "Before an action for false imprisonment under process of court can be maintained," says Mr. Bigelow, "it is necessary that the writ should be set aside, unless it appear to be absolutely void; for if the process is merely voidable, it is valid until quashed; and hence the arrest must, till then, be legal." (Bigelow, Torts, 131; *Day v. Bach*, 87 N. Y. 56; Bigelow, Leading Cases on Torts, 280.)

In this case no application was ever made to have the process set aside, but plaintiff appeared and put in bail. Having done this, and by neglecting to move for a discharge, he consented to the process and waived all

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irregularities in the manner of its issue. (*Forster v. Orr*, 17 Or. 447; *Mattoon v. Eder*, 6 Cal. 57.) It is clear, therefore, plaintiff is not entitled to maintain this action on account of any irregularity in the proceedings in the justice's court. That court had jurisdiction; and although its proceedings may have been irregular, and could have been set aside on application, they afford a complete justification for the arrest until set aside.

It is argued that if the arrest were made on Sunday, it was illegal, and the warrant or process is no defense or justification. Conceding this to be true, it does not appear that the arrest was made by the direction or with the knowledge of the defendants. The trespass, if any, was therefore committed by the officer, and not by the defendants. The defendants were not responsible for the manner in which the officer executed the process, unless he was acting by their direction at the time. They had sued out and caused to be delivered to him a valid process, and were only responsible for the validity of the process and for good faith in suing it out. "There is no law or justice," says the court, in *Adams v. Freeman*, 9 Johns. 118, "that a party who sues out and delivers to the sheriff a valid process should be responsible for the irregularity of the sheriff in executing the process, unless it appear affirmatively that the sheriff acted under his orders when he committed the trespass. The party who sues out process from a competent court is responsible only for the validity of the process and for good faith in suing it out. He is not to answer for the acts of the officer beyond the authority of the precept, unless he make those acts his own." (*Roth v. Smith*, 41 Ill. 314; *Ocean S. S. Co. v. Williams*, 69 Ga. 251.) It also appears that when plaintiff was arrested by the constable, he was taken to the apartments of defendant's attorney, who being asleep at the time, was aroused, when plaintiff asked to be allowed to give bail, but the attorney said it was too late, and directed the constable to put him in jail. From this fact it is urged

Points decided.

that the subsequent detention of plaintiff constituted false imprisonment, even if the arrest had been regular in every respect up to that time. There are no allegations in the complaint upon which this claim can be sustained. The complaint alleges a wrongful and unlawful imprisonment in a civil action in a justice's court, and not a lawful arrest which afterward became unlawful by reason of a refusal to receive bail. The plaintiff must recover upon the case as made by his complaint or not at all. To admit evidence of harsh or improper treatment of plaintiff, or any other act by which a lawful imprisonment becomes unlawful, the facts should be alleged in the complaint so that the defendant may be informed of the nature of the charge against him and come prepared to meet it by proof, if he so desire. (*Ocean Steamship Co. v. Williams*, 69 Ga. 251.) There is nothing in the evidence tending to show any liability on the part of the defendant Lacy.

The judgment is therefore affirmed.

[Filed March 29, 1892.]

THOMAS DEANE v. THE WILLAMETTE BRIDGE
COMPANY.

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CONSTITUTIONAL LAW—RULE OF CONSTRUCTION.—In passing upon the constitutionality of a law, an intent to violate the constitution is not to be presumed in any case; and every doubt is to be solved, and every intendment given, in favor of the constitutionality of the statute.

IDEM—TRIAL BY JURY—ASSESSMENT OF DAMAGES.—At common law, in actions of tort, where the defendant suffered a default, the assessment of damages by a jury was not a matter of right, but could be made by the court alone; hence, the provisions of subdivision 2, section 249, Hill's Code, (edition 1892,) requiring the court to assess the damages in such cases without the intervention of a jury, are not in conflict with the guaranty of the constitution of Oregon, that in civil cases the right of trial by jury shall remain inviolate.

Multnomah county: E. D. SHATTUCK, Judge.

Defendant appeals. Reversed.

Opinion of the court—LORD, J.

Dolph, Bellinger, Mallory & Simon, for Appellant.

McGinn, Sears & Simon, for Respondent.

LORD, J.—This is an action to recover damages for injuries which the plaintiff alleges he sustained while a passenger on a car of the defendant company as the result of its negligence. The facts show that the defendant suffered a default, and claimed under subdivision 2, section 249, Hill's Code, (edition 1892,) that the court should assess the damages. Upon demand by the plaintiff the court ordered the clerk to call a jury to assess the damages. A jury was thereupon empaneled, who, after hearing the evidence, returned a verdict for the plaintiff. The defendant took no part in the proceeding further than making the necessary objections and saving exceptions to the action of the trial court. Upon the verdict thus given, judgment was subsequently entered, and from this judgment the defendant has appealed. The error upon which the defendant relies to reverse the judgment, is the refusal of the trial court to hear the testimony and assess the damages without the intervention of a jury, as provided by the second subdivision of section 249 as amended by the act of 1891. (Laws, 1891, 173.) That subdivision is as follows: "In other actions, including all actions sounding in damages or tort, as opposed to an action for debt, if no answer be filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof, the clerk shall, upon a written motion of the plaintiff being filed, enter the default of the defendant, and thereafter the plaintiff may apply at the first or any subsequent term of court for the relief demanded in the complaint; and in all such cases, where judgment is rendered otherwise than on a verdict in favor of the plaintiff, the court, without the intervention of the jury, shall assess the damages which he shall recover. The court may hear the proof itself, or

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make an order of reference to hear and report the testimony. The defendant shall not be precluded, by reason of his default, from offering proof in mitigation of damages. In making such assessment of damages, the court shall appoint a time therefor upon notice to the parties to the action. The party aggrieved by the assessment of damages shall have the right to appeal therefrom."

The language of the statute is plain and unmistakable: the court shall assess the damages without the intervention of a jury. Nor is this controverted, for it is not claimed by counsel for plaintiff that the action of the trial court can be sustained by any construction of the statute. His contention is, that the statute is unconstitutional in that it deprives the plaintiff of the right of trial by jury. He says: "Notwithstanding the statute, the plaintiff not having waived his right to trial by jury, was entitled under the constitution to have the damages assessed by a jury." In other words, his contention is, that the assessment of damages by a jury, after default, is a trial by jury of a civil case in the sense of the constitution. The provision of the constitution of this state relating to trial by jury in civil cases, is section 17 of article 1, and is as follows: "In all civil cases, the right of trial by jury shall remain inviolate." This provision of the constitution creates no new right to trial by jury. It simply secures to suitors the right to trial by jury in all cases where that right existed at the time the constitution was adopted. "This language of the constitution," said BOISE, J., "indicates that the right of trial by jury shall continue to all suitors in courts, in all cases in which it was secured to them by the laws and practice of the courts at the time of the adoption of the constitution." (*Tribou v. Strowbridge*, 7 Or. 158.) KELLY, C. J., said: "It was intended as a safeguard in the trial of those cases for which it is stipulated that the courts shall remain open, and wherein the parties to the suit shall have a trial by due course of law." (*Kendall v. Post*, 8 Or. 146.)

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A like provision is found in the constitution of the state of Indiana. In *Allen v. Anderson*, 57 Ind. 389, it was held that the provision of section 20, article 1, of the constitution of that state, that "in all civil cases the right of trial by jury shall remain inviolate," was adopted in reference to the common law right of trial by jury. "This provision of the constitution," said BIDDLE, C. J., "was adopted in reference to the common law right of trial by jury as the language plainly imports, namely, that the right shall remain inviolate; that is, continue as it was. The words in all civil actions mean in all civil actions at the common law, as debt, covenant, assumpsit, trover, replevin, trespass, action on the case, etc."

The question, then, for our determination is, whether subdivision 2 of section 249 is repugnant to the constitution, in that it impairs or destroys the right of trial by jury, as it existed according to the course of common law. When it is understood what was meant by a trial by jury at common law, we will be prepared to understand whether the assessment of damages by a jury in actions of tort upon default, is a matter of right, or merely of practice. In the English practice, where the defendant suffers a default in a tort, a writ of inquiry was generally directed to the sheriff commanding him "by the oaths of twelve honest and lawful men to inquire into the damages and return such inquisition into court." Before the writ was issued, an interlocutory judgment was entered, "that the plaintiff ought to recover his damages." In the execution of the writ, the sheriff acts as judge, and tries, by a jury, the amount of damages the plaintiff has sustained. When the verdict is rendered, which must be for some damages, the inquisition is returned, and judgment is entered that the plaintiff recover the damages so assessed. (Steph. Pl. 133; 3 Black. Com. 397.) In such case, as the defendant admitted by his default that the plaintiff had a cause of action as alleged, all that the plaintiff was required to

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prove, or the defendant was allowed to dispute, was the amount of damages. It thus appears at common law, where the defendant failed to answer after having been duly summoned, a judgment by default was entered against him, which established the plaintiff's right to recover damages, and only left to the defendant the right to dispute the amount of such recovery, which was usually ascertained upon a writ of inquiry in the manner described. By some of the old authorities, a writ of inquiry is considered a mere instrument to inform the conscience of the court.

In *Bruce v. Rawlins*, 3 Wils. 62, WILMOT, C. J., said: "This is an inquest of office to inform the conscience of the court, who if they please, may themselves assess the damages." In *Beardmor v. Carrington*, 2 Wils. 248, a like doctrine was announced by the same distinguished judge, where he said: "There is a difference between a principal verdict and a writ of inquiry of damages, the latter being only an inquest of office to inform the conscience of the court, and which they might have assessed themselves without any inquest at all." (*Hewett v. Mantell*, 2 Wils. 372.)

In 7 Vin. Abr. 301, it is said that "on demurrer in law, the justices may award damages for the party by their discretion, or award a writ to inquire of damages at their election." "Where judgment is by default, the court may give the damages, without putting the party to the trouble of a writ of inquiry." (*Ibid.* 308.) "The court may not only assess damages originally, but increase the damages previously assessed by the jury." (*Ibid.* 270.) In Finlayson's *Reeves' History of English Law*, it is said: "After a writ of inquiry, the court might either increase or abridge both the damages and costs as they pleased, because this was only an inquest of office to inform the court, who might have assessed the damages without an inquest." And in a note, it is added: "There was this distinction between trial by jury and mere inquisition, or inquiry by a jury, to assess damages,—that, in the latter case the inquisition was only

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to inform the mind of the court, and it was at their discretion whether they would award judgment for the amount found by the jury, whereas upon trial they had no jurisdiction to interfere as to the amount of damages in cases of tort, except as to costs." (Vol. 3, 567.) According to these authorities, the distinction is plainly made between a trial by jury in an action for damages and the proceeding by writ of inquiry to ascertain the damages due from the defendant against whom an interlocutory judgment has been entered by default. In the former case the defendant has appeared and answered, and put in issue the facts alleged in the declaration as the plaintiff's cause of action, and a trial upon all such issues of fact must be by jury; while in the latter, the only purpose of the writ in authorizing the jury to inquire into the damages is to inform the mind or conscience of the court. This being its object, unless the court choose to issue the writ for its own information, it necessarily follows that it is discretionary with the court whether it will issue the writ, or, when issued, whether it will award the amount of damages found by the jury, or assess the damages itself without any inquest. This result proceeds upon the hypothesis that upon default the cause of action upon which issue might have been joined, stands admitted, and that there is no issue of fact to try, or nothing evolved by the pleadings upon which there can be a trial by jury.

Damages are the pecuniary consequences which the law imposes for the breach of some duty, or the violation of some right. When the facts constituting the right violated or duty neglected are alleged upon one side and denied upon the other, they form an issue to be tried by a jury. But when such facts are admitted, there is no issue to be tried by a jury,—the plaintiff's right to damage stands confessed. Blackstone defines a trial to be "the examination of the matter of fact in issue in a cause." (3 Black. Com. 330.) "The decision of the issue of fact is called the

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trial." (Steph. Pl. 77.) "By the common law," said SHIPMAN, J., "at the date of the adoption of the constitution, the trial of all issues of fact must be by jury. By issues of fact, are meant questions of fact as distinguished from questions of law, which the result of the pleadings in each case shows to be in dispute or controversy between the parties, and a jury trial in issues of fact was the right of the litigant." (*Raymond v. R. R. Co.* 43 Conn. 596; 14 Blatch. C. C. 133.) The common law required that the parties should form an issue by their pleadings before the case could be tried by a jury. It is when the parties by their pleadings come to an issue, that there is a case to be tried by jury. When the matter alleged as the foundation of the cause of action stands confessed, there is no matter of fact in issue for the examination of a jury. It results, then, that there could be no trial by jury where there is no matter of fact in issue for their examination. Said DALY, J.: "If issue has been joined, the plaintiff, whether the defendant appear to contest the trial or not, is bound to go on and establish the truth of the matter put in issue; but where the plaintiff takes judgment by default for want of an answer, the cause of action is admitted, and there is no occasion for a trial. A writ of inquiry or a reference is ordered merely to ascertain the amount of the plaintiff's damages." (*Randolph v. Foster*, 3 E. D. Smith, 648.) In *Raymond v. R. R. Co. supra*, it was held, where the defendant in a tort suffers a default, that the plaintiff has no constitutional right to have his damages assessed by a jury; and that the assessment of damages upon a default, either on contract or tort, stands upon a different footing from the trial of issues of fact. The assessment of damages by a jury, when done, is a matter of practice rather than of right. SHIPMAN, J., said: "But the assessment of damages upon a default, either in actions of tort or of contract, stood upon a different footing from the trial of issues of fact. In the early history of the law, the subject of the

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ascertainment of damages was in some confusion. The courts frequently fixed the amount of damages on a judgment by default and on demurrer." (Rolle's Abr. Title Damages.) And, "though the justices used to award inquest of damages when they gave judgment by default, yet they may give damages if they will. (Sedg. Dam. 704; Vin. Abr. Dam. 1.) Courts have also the right of revising the amount of damages which has been assessed upon a writ of inquiry." And again: "The assessment of damages by a jury in actions of tort was, however, a matter of practice, and not of right. Chief Justice WILMOT held that a writ of inquiry in an action of tort is an inquest of office to inform the conscience of the court which could itself have assessed the damages without any inquest." Under the English practice, the writ was issued at the option of the plaintiff and not of the defendant. The defendant having suffered default, has no election in the case. (1 Suth. Dam. 772.) But it was merely a rule of practice and not a matter of right. SAWYER, J., said: "The rules which govern the English practice have but little application to ours. With us, in defaulted actions, the court assesses the damages, unless for some special reason they order an inquiry into the damages by a jury; and in case that is done, no writ of inquiry issues to the sheriff, but the question is submitted by the court to one of the juries in attendance. If the court undertake to make the assessment, there is nothing in the nature of the proceeding to forbid that the question be referred to a master for informing the conscience of the court; and his doings being approved and adopted by the court become theirs. Such has long been the practice, and it is one of great convenience to both the court and the parties." (*Price v. Dearborn*, 34 N. H. 486.)

From these considerations it would seem that the provision of the constitution which guarantees a trial by jury in all civil cases means in all civil actions at common law,

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as debt, covenant, assumpsit, trover, replevin, trespass, action on the case, etc., and that no civil case or cause of action can be tried by a jury until there has been an issue of fact made by the pleadings of the parties; that where in a tort the plaintiff takes judgment for want of an answer, the cause of action is admitted, and there being no issue, there is no occasion for a trial by jury; that the purpose of a writ of inquiry was merely to ascertain the amount of the plaintiff's damages for the information of the court, which could itself have assessed the damages without it, and is not a trial of a civil case or cause of action; that a writ of inquiry, as established at common law, was a matter of practice, and not of right, and is subject to the supervision of the court or the legislature.

Prior to the adoption of the constitution of this state, construed in the light of our inquiries, the statute did not give to suitors the right to have a jury assess damages in case of failure of the defendant to answer. The statutes of the territory of Oregon, 116, provide, among other things, that where the defendant is in default in answering the complaint, and "the action is for the recovery of damages only, or for specific, real, or personal property, with damages for the holding thereof, the court may order the damages to be assessed by the jury; or, if to determine the amount of damages, the examination of a long account be necessary, by reference as above provided." This section is substantially copied into the codes of 1862, 1872, and 1887, in the latter of which it is section 249, which was amended by the act as above stated. This amendment makes no substantial difference in the original section, other than requiring the court to assess the damages in all actions sounding in damages or tort upon default without a jury. The language of the territorial statute, which was in force at the time of the adoption of the constitution, is upon default that "the court may order the damages to be assessed by a jury," indicating that the power vested in the court

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was discretionary, either to assess the damages itself or direct a jury to assess them. This construction is consistent with the practice as established at the common law. Under that practice, the power was discretionary. May is construed as must only in cases where the legislature meant to impose a positive and absolute duty, and not merely a discretionary power. (*Thompson v. Lessee of Carroll*, 22 How. 422.)

Viewed in the light of the object of the writ, after judgment by default, at common law, this construction of the territorial statute is consistent in making the power conferred discretionary in the court, either to order the damages to be assessed by a jury, or to assess the damages itself. So that it cannot be said with confidence that the plaintiff had the right to demand a jury to assess the damages on default under that statute prior to the adoption of the constitution; nor does the amended statute, subdivision 2, section 249, in authorizing the court to act without a jury upon default in the assessment of damages, conflict with the constitutional guaranty by depriving the plaintiff of a trial by jury in a civil case. Upon default, as we have shown, there is made by the pleadings of the parties no issue of fact to be tried by a jury. The cause of action is admitted, and there is no occasion for a trial by jury. The common law right of trial by jury, which it was the purpose of this constitutional provision to secure, relates only to those civil cases or causes of action in which there has been an issue made by the pleadings of the parties—where the facts alleged constituting the cause of action are denied and an issue of fact is formed, which must be tried by a jury. Such a trial of an action has no application to an inquiry into damages, whether by the court, or by a jury, after default, when the cause of action stands confessed. So that it is immaterial whether we construe the territorial statute in force at the adoption of the constitution as conferring or not a discretionary power upon the court, after

Points decided.

default, the inquiry into damages by a jury in such case does not involve the trial of an issue made by the pleadings of the parties, but is a mere matter of practice and not of right, which could have been superseded by statute without affecting the common law rights of the parties to a trial by jury.

This being so, the amendment of the section does not impair the right of trial by jury in a civil case or cause of action, but is a mere change in practice, which the legislature is competent to make. As an intent to violate the constitution is not to be presumed in any case, so too is every doubt to be solved, and every intendment to be given in favor of the constitutionality of the statute. Guided by this principle, in view of the considerations suggested, we must affirm the validity of this statute.

The judgment must be reversed, and the cause remanded for such further proceedings as may be just and proper not inconsistent with this opinion.

[Filed March 29, 1892.]

LOUIS SALOMON v. JOHN M. CRESS ET AL.

PRACTICE—NONSUIT—EVIDENCE.—In considering a motion for nonsuit, the court will not examine the weight of the evidence offered by the plaintiff; but if there be any evidence which the jury might believe, and upon which a verdict might be based, the motion will be denied.

JURY TRIAL—INSTRUCTIONS—EXCEPTIONS.—(a) A general exception to a charge as a whole cannot be sustained when any part thereof is sound; (b) to maintain an exception to a refusal to charge an entire series of propositions, each one of them must be sound; and (c) an exception cannot be sustained to portions of a charge variant from requests made by a party unless the variance be pointed out.

INSTRUCTIONS—ASSUMPTIONS OF FACT.—An instruction which assumes any controverted allegation to be proven, is erroneous as invading the province of the jury.

Multnomah county: E. D. SHATTUCK, Judge.

Defendants appeal. Affirmed.

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133	370

22	177
286	148

22	177
30	549

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This is an action originally commenced before a justice of the peace to recover one hundred and sixty-two dollars alleged to be due from the defendants to the plaintiff as commission for selling for defendants certain real property in the city of Portland. The answer denies the allegations of the complaint. In the justice's court the defendants had judgment for their costs, from which the plaintiff appealed to the circuit court. Upon a trial in the circuit court the plaintiff recovered a verdict and judgment for the full amount claimed, from which the defendants have appealed to this court. The facts sufficiently appear in the opinion.

Killin, Starr & Thomas, for Appellants.

McGinn, Sears & Simon, for Respondent.

STRAHAN, C. J.—At the conclusion of the plaintiff's evidence, the defendants moved for a nonsuit, on the ground that the plaintiff had failed to prove a case sufficient to be submitted to a jury. All of the evidence offered by the plaintiff is contained in the bill of exceptions, and this presents a question as to its sufficiency, which we are to determine on this appeal. In passing upon this question we only examine the record far enough to ascertain whether or not there was some evidence on each material issue. We do not assume to weigh such evidence or to determine its sufficiency, but only that there was some evidence before the jury upon which they might find a verdict if they believed the witnesses. We have carefully read all the evidence in the case at the time the motion for a nonsuit was submitted, and find it very full and explicit upon every issue. On this evidence the court below could not have done otherwise than overrule the motion for a nonsuit, and allow the case to go to the jury.

The only other exception in the case is to the ruling of the court in refusing to give the instructions asked on the part of the defendants, which instructions are as follows:

"1. If the services of Salomon, whatever they be, failed to accomplish a sale, and afterwards Ellis was induced to reconsider his resolution by Colvin, and then made the purchase as the consequence of such secondary or supervening influence, notwithstanding the fact that Salomon first pointed out the property to him, and that he (Ellis) may never have looked at the property nor entertained a thought of buying it but for Salomon, Salomon is not entitled to recover, as his agency was not the immediate and efficient cause of the sale. The law regards only proximate and not remote causes in a case of this kind, where two or more brokers have the same property for sale.

"2. Where an owner of real estate employs two brokers to sell such real estate and then remains neutral between them, and where one of such brokers brings to him a purchaser, he may immediately convey the property to the purchaser, and pay the broker, without any inquiry as to whether the other broker may not have had something to do in effecting the sale.

"3. Where two or more agents have the same property for sale, in the absence of collusion on the part of the vendor, the agent through whose instrumentality the sale is carried to completion, is entitled to the commission."

But the court refused to give said instructions, to which refusal by the court the defendants at the time duly excepted, which exception was allowed by the court. These instructions were not asked separately and the ruling of the court taken upon each, but they were asked as a whole, and upon the refusal of the court to give them, but a single exception was taken. This state of the record brings the case clearly within *Murray v. Murray*, 6 Or. 17. In that case this court, per SHATTUCK, J., declared the rule relative to exceptions of this kind as follows: "1. When any part of a charge given is sound, a general exception to the charge as a whole cannot be sustained; 2. To maintain an exception to a refusal to charge an entire series of

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propositions, each one of the propositions must be sound; 3. An exception to such portions of a charge as are variant from the requests made by the party, not pointing out the variance, cannot be sustained."

These propositions are fully sustained by authorities, state the correct rule of practice, and cannot be departed from by the court. All the instructions in the series must be sound and applicable to the facts in evidence, or else the exception cannot be sustained. So far as I can discover from the evidence, Ellis, the purchaser, from the time Salomon first called his attention to this property, was anxious or at least willing to buy it. The only question in the negotiations was his ability to pay or secure the purchase money in a manner satisfactory to the defendants. There is nothing in the case, therefore, to justify the assumption in the first instruction that Ellis was induced to reconsider his resolution by Colvin, nor does it appear that Ellis made the purchase in consequence of such secondary or supervening influence. And I think that the words in the first instruction, "Salomon is not entitled to recover, as his agency was not the immediate and efficient cause of the sale," though in some manner connected with what goes before, are misleading. The jury could hardly understand that this statement was dependent on the antecedent part of the instruction. It was probably so intended by the writer of the instruction, but the connection seems too remote to make it a safe proposition to be given to a jury in that form. The words, "as his agency was not the immediate and efficient cause of the sale," sound more like a declaration that the court was asked to make on the very fact which the jury was to try. Besides, the statement in this charge, that "the law regards only proximate and not remote causes in a case of this kind, where two or more brokers have the same property for sale," is entirely too general in its terms, and leaves a wide field open for the jury to speculate on what are proximate and what are

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remote causes in a case of this kind. And it may be observed that even the counsel or this court might find it a somewhat difficult thing to do, to define with accuracy just what are proximate and what are remote causes within the meaning of this instruction. We think this part of this instruction was misleading, unless it were accompanied by some definition of what would be proximate and what would be remote causes within the meaning of the instruction. From this instruction alone, how could the jury know?

The second instruction seems to assume as a fact, with which the jury had no concern, that the owner of this property had employed two brokers to sell the same. He may and probably did so, but if the fact is material, as it is assumed to be by this instruction, it was the province of the jury to find it from the evidence. Therefore, this instruction should have submitted the question hypothetically to the jury, and it should have been informed that if it found from the evidence that the owner of this real estate had employed two brokers to sell such real estate, etc. The instruction assumes the existence of the fact, and thus entirely excludes the deliberations of the jury from that question. There was some evidence on this subject before the jury. This it had a right to consider, but this instruction, had it been given, would have effectually taken that question from the jury. The view which we have taken of this case renders it unnecessary to consider the very interesting question of practice which was presented on the argument.

Let the judgment appealed from be affirmed.

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[Filed March 29, 1892.]

THOMAS STEWART v. MARKS ALTSTOCK.

RAILROAD LANDS—GRANT IN PRESENTI—ACT OF CONGRESS.—The grant of lands to the Northern Pacific Railroad Company, by the third section of the act of congress of July 2, 1864, incorporating that company, is a grant *in presenti*, in the nature of a float, until the route was determined according to the requirements of the act; and after that, definite in its nature, attaching to specific sections capable of identification, except as to sections which were expressly reserved.

PUBLIC LANDS—PRIVATE ENTRY.—Public lands, within the meaning of the acts of congress, are such as are subject to sale or other disposal under general laws, and do not include those previously granted or in process of private entry by pre-emption, homestead, or the like.

VOID PATENT—REMEDY AT LAW—PLEADING.—A patent issued for lands not granted, or that were excepted out of the grant under which the patent issued, passes no title, is void, and may be attacked in an action at law by a defendant against whom it is used, if he be a party deraining from the general government a valid paramount title to land included in the patent and the subject of the action; but the pleading of such a party must affirmatively allege the ultimate facts showing him to be in a position to make such attack.

Multnomah county: L. B. STEARNS, Judge.

Defendant appeals. Reversed.

This litigation was originally commenced by the present defendant against the plaintiff herein, and was in the form of an action of ejectment to recover all of lot No. 37, and the south four-fifths of lot No. 13, in the city of Eastwood, county of Multnomah, state of Oregon. The defendant in that action filed his answer, substantially admitting that he was without a defense at law, but alleged that he was entitled to the interposition of a court of equity to make good his defense; and thereupon, as plaintiff, filed his cross-bill, by which he alleged in substance that the real property sought to be recovered in the original action is a part of the northwest quarter of section 5, in township 1 south, range 3 east, Willamette meridian; that said real property was covered and included in the grant of land made to the Northern Pacific Railroad Company, by act of

29	182
127	37
22	182
444	352
22	182
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congress of July 2, 1864, entitled, "An act granting lands to aid in the construction of a railroad and telegraph lines from Lake Superior to Puget Sound on the Pacific coast by the northern route," and the acts and joint resolutions of congress supplementary thereto, and that by virtue of said grant the title to said land was conveyed to the Northern Pacific Railroad Company; that the congress of the United States, by act of July 25, 1866, entitled, "An act granting land to aid in the construction of a railroad and telegraph lines from the Central Pacific Railroad in California to Portland, Oregon," and an act amendatory thereof, July 25, 1868, granted certain lands to the Oregon Central Railroad Company, and that the Oregon & California Railroad Company, as successor to the said Oregon Central Railroad Company, erroneously, falsely, fraudulently, and illegally claimed the land mentioned in said complaint, and first above described, as being covered by said last-named grant and belonging to it, the said Oregon & California Railroad Company, by reason and virtue of said grant; that the said Oregon & California Railroad Company, erroneously, falsely, and fraudulently selected, listed, and certified the said land first above described as belonging to and included in its said grant; that the official agents of the United States, whose duty it was to carry into effect said grant, and execute conveyances to the lands conveyed thereby, when earned, relying upon and believing such false and fraudulent representations, caused to be executed and delivered a patent and conveyance of said parcel of land first above described to the Oregon & California Railroad Company on the seventh day of May, 1871, which conveyance was first recorded in the records of deeds of said county and state on the third day of February, 1891; that the only claim of the defendant herein, Marks Altstock, to said real estate is by virtue of claiming by mesne conveyances from and under the said Oregon & California Railroad Company; that the said real property never was included in or cov-

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ered by the said grant of July 25, 1866, under which the said Oregon & California Railroad Company and its successors claim, and that neither the said company nor its successors, nor any of them, ever had any title thereto; that said conveyance from the United States to the Oregon & California Railroad Company was irregularly, erroneously, and illegally issued and made, and was issued and made by mistake, in the belief and with the intention of conveying only such land as was included in the last-named grant, and that such conveyance was and is void; that the line of definite location of said Northern Pacific Railroad was duly fixed opposite said land, and maps of the routes of said road duly filed in the proper office of the land department of the United States prior to the time that the Oregon Central Railroad Company or its successors did the same as to the grant of the said last-named company; that the congress of the United States, by an act of September 29, 1890, entitled, "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," duly forfeited to the United States that part of the said grant of the Northern Pacific Railroad Company, which embraced and covered the parcel of land herein first above described, and that the same then became and ever since has been government land and the sole property of the United States, open to homestead settlement, subject only to the rights of this plaintiff, as hereinafter stated; of all of which foregoing facts the defendant had due notice; that this plaintiff settled upon and took possession of the said real estate on the — day of April, 1891, as a homestead, under the settlement laws of the United States, and ever since has been and now is in the exclusive and actual possession of the same, and has taken and now is taking the proper and necessary steps towards obtaining and perfecting title thereto from the United States under the general homestead laws. Wherefore this plaintiff prays that said proceedings at law be stayed, and upon trial, for a

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decree perpetually enjoining the same by final decree, and decreeing that the said patent and conveyance from the United States to the Oregon & California Railroad Company, so far as it affects the parcel of land mentioned in the said complaint and first above described herein, and all conveyances therefor, subsequent to said patent, to be null and void; that the plaintiff is entitled to the possession of said land and to his costs and disbursements herein, and for such other or further relief as may be equitable.

The defendant demurred to this complaint, which being overruled, a final decree was entered in favor of the plaintiff, from which the defendant appealed.

J. V. Beach, for Appellant.

V. K. Strode, for Respondent.

STRAHAN, C. J.—The questions presented by this appeal arise on the demurrer to the cross-bill, and to that our attention must be directed. It appears from this complaint that the real property in controversy lies within the grant made by congress to the Northern Pacific Railroad Company. By act of July 2, 1864, 13 Stat. c. 217, 365, congress incorporated the Northern Pacific Railroad Company; and after providing for the organization of said corporation, and defining the line of its road, the third section of the act made a grant of land to aid in its construction. By this section congress granted to said company, by its corporate name, for the purpose of aiding the objects of said corporation, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections per mile on each side of said railroad where the line thereof passes through any state, and the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or

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rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office.

In *St. Paul etc. R. R. Co. v. N. P. R. R. Co.* 139 U. S. 1, the supreme court considered the nature of this grant, and held it to be a grant *in presenti*, in the nature of a float, until the route should be determined, and after that, attaching to specific sections capable of identification, except as to sections which were specifically reserved. And in *Buttz v. N. P. R. R. Co.* 119 U. S. 55, the construction of this grant was again before the court, and it was held that where the general route of the road provided for in section six of the act of July 2, 1864, was fixed, and information thereof was given to the land department by filing a map thereof with the secretary of the interior, the statute withdrew from sale or preëmption the odd sections to the extent of forty miles on each side thereof; and by way of precautionary notice to the public, an executive withdrawal was a wise exercise of authority. The statute and these authorities, taken in connection with the allegations of the complaint, are sufficient to show that the lands in controversy were separated and severed from the public lands of the United States by the location of the line of the road and the filing of a map or plat thereof in the proper land department at Washington.

The next question requiring attention is the effect of the act of July 25, 1866, granting land to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, Oregon. (14 Stat. at Large, 239.) By this act every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line, were granted, and it is by virtue of this grant that the defendant claims title. By this act congress granted public lands only, and not land that had been theretofore granted or appropriated by

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authority of congress in any way. Said grant did not extend to or include any lands not public, and no lands not included or covered by the terms of the grant could pass thereunder.

In *Newhall v. Sanger*, 92 U. S. 761, construing a similar grant, the court said: "The words public lands are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws; that they were so employed in this instance is evident from the fact that to them alone could the order withdrawing lands from preëmption, private entry, and sale, apply." And it was held in the early case of *Wilcox v. Jackson*, 13 Pet. 496, that a tract lawfully appropriated to any purpose becomes thereafter severed from the public lands, and that no subsequent law or proclamation will be construed to embrace it or to operate upon it, although no exception be made of it; and this doctrine was reëffirmed in *Leavenworth, etc. R. R. Co. v. United States*, 92 U. S. 733. And this court in *Brown v. Corson*, 16 Or. 388, in construing the terms of the grant now under consideration, in effect held that a piece of land that had been preëmpted prior to the time the company's rights attached under the grant, though within the limits and in an odd section, was excepted out of the grant, and that the railroad company acquired no rights to such land, even if the same were afterward abandoned and no attempt made by the preëmption claimant to perfect his title by compliance with the law. And a subsisting homestead entry, valid upon its face, whose legality has been passed upon by the land authorities, and their action remains unreversed, precludes it from a subsequent grant by congress. (*H. & D. R. R. Co. v. Whitney*, 132 U. S. 357.)

The question that we have to consider, then, is the effect to be given to a patent issued for lands not granted, or that were excepted out of the grant under which the patent issued. In such case the patent passes no title, and is simply void. (*Morton v. Nebraska*, 21 Wall. 660; *Sherman v.*

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Buick, 93 U.S. 209; *Doe ex dem. Patterson v. Winn*, 11 Wheat. *380; *Field v. Seabury*, 19 How. 323; *Simmons v. Wagner*, 101 U. S. 260; *Kissell v. Public Schools*, 18 How. 19; *Foss v. Hinkell*, 78 Cal. 158; *Doolan v. Carr*, 125 U.S. 618; *Stoddard v. Chambers*, 2 How. 284; *Reichart v. Felps*, 6 Wall. 160.)

The plaintiff has not yet shown himself to be a qualified homestead claimant, nor has he shown any compliance with the law granting homesteads to actual settlers upon the public lands of the United States, or that the lands in controversy were public lands of the United States and open to settlement under the homestead act; but assuming for the present that he might do so by an amendment of his complaint, the question is presented whether or not he would be in such privity with the title of the United States as to enable him to attack the patent under which the defendant holds and shows its invalidity. On this point we had some doubt at first, but the authorities seem to go to that extent.

Foss v. Hinkell, *supra*, was a case involving this principle, and it was held that the claimant stood in such relation to the land that he might attack a void patent which had been issued to the railroad company, through which the adverse party claimed title. (*Doolan v. Carr*, 125 U.S. 618.) In the latter case the court held that in an action at law such extrinsic facts may be proven as tend to show the patent is void. But the important question remains. It is not to every person indiscriminately that the privileges of of the homestead act are extended. It is confined to any person who is the head of a family, or who has arrived at the age of twenty-one years and is a citizen of the United States, or who has filed his intention to become such, as required by the naturalization laws; or he must be a person owning and residing on land who is allowed to enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in

the aggregate one hundred and sixty acres. (Rev. Stat. U. S. § 2289.)

The plaintiff's complaint is fatally defective, for the reason that the language employed fails to bring the plaintiff within the words of this section. Unless he be such a person as is specified in some one of the clauses of this section, it could not be claimed that he acquired any rights by virtue thereof. To enable a person, in all respects qualified under section 2289, *supra*, to acquire the rights and status of a homestead settler, he must show a compliance with section 2290, Revised Statutes of the United States. By that section any person applying for the benefit of the preceding section shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver that he is the head of a family, or is twenty-one years or more of age, or has performed service in the army or navy of the United States, and that such application is made for his exclusive use and benefit, and that his entry is made for the actual purpose of settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and in addition he must show the lands were unappropriated public lands of the United States.

The complaint is defective in failing to show a compliance with this section. It could hardly be contended that a person could acquire a title to the public lands of the United States without a compliance with the statutes under which such right is alleged to have been acquired. It is true the complaint alleges that the plaintiff has taken and is now taking the proper and necessary steps toward obtaining and perfecting title thereto from the United States under the general homestead laws; but this allegation presents no material fact. What are the proper and necessary steps in such case is purely a question of law; and to enable the court to determine that question, the facts must be alleged,—that is, the plaintiff must allege what he did in

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that behalf,—and then the court can determine whether the steps taken are proper and necessary. The principles announced in *Larsen v. O. R. & N. Co.* 19 Or. 240, tend to this result.

It might be assumed that these defects could be supplied or obviated by an amendment of the complaint in the court below; and if it appeared possible, we would feel constrained to remand the cause, so that the plaintiff could, if so advised, apply to that court for such permission; but in this case such a step could not avail him. To give him any standing to contest the defendant's title, within the rule laid down by the authorities on that subject, he must be able to allege, in addition to the matters above enumerated, that at the time of his settlement the lands in controversy were unappropriated public lands of the United States. Unless they were so, by the very language of the homestead act, they could not be settled upon or taken by virtue of its provisions. Whether the defendant is within the act of March 3, 1887, Rev. Stat. U. S. Supp. 313, or the provisions of the act of September 20, 1890, Rev. Stat. U. S. Supp. 808, we did not find it necessary to determine. The facts are not now before us sufficient to enable us to determine that question. That the present plaintiff shows himself not to be entitled, is as far as we need inquire.

It follows from what has been said that the decree appealed from must be reversed and the cross-bill dismissed.

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[Filed March 29, 1892.]

22 191
47 516**OLIVER H. COLE v. HENRY NEUSTADTER ET AL.**

LIBEL—DEFINITION.—Libel may be defined to be a malicious publication in writing, signs, or pictures, imputing to another something which tends to injure his reputation, to disgrace or degrade him in society, and to lower him in the esteem and opinion of the world, or to bring him into public hatred, contempt, or ridicule.

PLEADING—LIBEL—INNUEENDO.—An innuendo serves to explain precedent matter, but never to establish a new charge or enlarge or change the sense of previous words.

Multnomah county: E. D. SHATTUCK, Judge.

Plaintiff appeals. Affirmed.

This is an action to recover damages for libel. The question presented arises on the sufficiency of the complaint, which is given entire, as follows: "The plaintiff, by leave of the court in that behalf first had and obtained, now makes and files this his second amended complaint, and against the defendants above named complaining, for cause of action alleges: That at and during all the times in this complaint mentioned, the defendants Henry Neustadter, Jacob H. Neustadter, Sigmund Feuchtwanger, and Isaac Oppenheimer, were and still are co-partners doing business under the firm name and style of Neustadter Brothers, and were and are extensively engaged in the wholesale dry goods business in the city of New York, state of New York, and in the city of San Francisco, state of California, and in the city of Portland, state of Oregon, and throughout the states of California, Oregon, Washington, and Idaho, and have and maintain branch houses for the conduct of their said business in each of the cities above named; and have paid and will pay large sums of money annually for insurance of their property against loss by fire, a portion of which moneys have heretofore been paid to insurance companies with which this plaintiff has and had business relations, as hereinafter more particularly stated; and that at and during all the said

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times the defendant Bernhard Neustadter was and still is the duly appointed and acting manager at Portland, Oregon, for the said firm of Neustadter Brothers.

"That for more than seven years last past the plaintiff has been and still is engaged at Portland, Oregon, and elsewhere throughout the states of Oregon, Washington, Idaho, and Montana, in the business of adjusting losses by fire to property covered by insurance; and as such has been employed by various fire insurance companies engaged in insuring property against loss by fire in said states, and in the state of California, and elsewhere; and that during all of said time the business of plaintiff has been and still is that of an adjuster of fire losses. That during said time the plaintiff has been employed as such adjuster by the Liverpool, London & Globe Insurance Company, the North British & Mercantile Insurance Company, the German American Insurance Company, the New Zealand Insurance Company, and by various other insurance companies engaged in said business in said places; that the said business of plaintiff, for its successful operation, required peculiar skill and a thorough knowledge of the business of fire insurance, which are only acquired by long and careful study thereof, and which skill and knowledge this plaintiff has at all of said times possessed, and still possesses.

"That plaintiff is and during all the times herein mentioned has been a person of good repute, and during all said time has maintained and still maintains among fire insurance companies and among those engaged in the fire insurance business on the Pacific Coast and elsewhere, and particularly among the people of the city of Portland, where this plaintiff has during all said time resided, and still resides, a reputation for skill, ability and good judgment, and honesty and integrity in the conduct of his said business, and in the performance of the duties of his said employment; and has, by his fidelity and skill, and the

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faithful and diligent discharge of his duties and obligations devolving upon him by reason of his said employment, gained and secured the confidence and esteem of those by whom he has been employed, and of the people in general throughout the said states; and had thereby established for himself in said states a large and profitable business in the adjustment of fire losses, which has heretofore and prior to the commission of the acts by the defendants, as hereinafter complained of, yielded to plaintiff large profits; and which business and the profits thereof would reasonably increase in the future; and that plaintiff was in the full enjoyment of the said reputation and the benefits thereof at the time of the commission of the acts hereinafter complained of by the defendants herein.

"That the continued success and increase of the said business and the profits thereof depend solely upon the retention by plaintiff of the said reputation and the good will and esteem of those with whom he has had business relations, and of the public in general.

"That by reason of the large business done by the defendants Neustadter Brothers, and the extensive business relations existing between them and other business houses and firms in the states above named, the said defendants are able to and do control the placing of a large amount of risks of fire insurance, in addition to the risks carried by them on their own property, by reason whereof their good will and influence are of great pecuniary value; that all the aforesaid facts were at all of the times herein mentioned well known to the defendants herein.

"And plaintiff further says, that on and prior to the date of the fire hereinafter mentioned, to wit, on the fifth day of December, 1890, the firm of Le Lee & Co., being the same persons referred to in the letter hereinafter set forth, were the proprietors of a retail dry-goods store and business in the said city of Portland, and that their goods and property in said store were insured against loss or

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damage by fire in the following fire insurance companies, to wit: The Liverpool, London & Globe Insurance Company, the Norwich Union Fire Insurance Society, and the Commercial Insurance Company; and that on the said date a fire occurred whereby a partial loss to the said goods was suffered; that thereupon this plaintiff was employed by the insurance companies above named to adjust said loss; and that thereafter, and under and by virtue of the provisions of the policies of insurance covering said loss, one Victor Stedaker was appointed by said insurance companies, and one Strauss appointed by said insured, and the two so appointed selected one Daniel McAllen, the three so selected to act as appraisers of said loss, and to adjust the same between the said insurance companies and said insured; and that the said appraisers at once assumed the duties of their appointment; and in connection with this plaintiff as such adjuster proceeded to settle and determine the amount of said loss, with the full assent and concurrence of the said assured and of said insurance companies interested; that while they were so engaged the defendant Bernhard Neustadter, unwarrantly and without any right whatever, attempted to interfere with the said appraisers in the adjustment of said loss, and undertook to influence their decision therein; and that this plaintiff then politely but firmly informed him that he would not be permitted to do so; that the defendants Neustadter Brothers were creditors of said firm of Le Lee & Co., and that one of the clerks of said Neustadter Brothers was employed by said Strauss as his clerk in making said appraisal and adjustment of said loss; that after the items of said loss had been written in the books of said appraisers and had been checked off, and before the same had been added up or said appraisal finally made, and on the sixteenth day of December, 1890, the said defendant Bernhard Neustadter came to the office of the plaintiff in the city of Portland, Oregon, and without right, and impertinently

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inquired of this plaintiff what he, plaintiff, was going to do about the adjustment and appraisal of said loss; and that thereupon this plaintiff said to said defendant: 'Mr. Ben. Neustadter, I have had one or two interviews with you in regard to this matter, (meaning the adjustment of the said loss,) and I don't want any more of your damned interference in this case. Do you understand?' Whereupon the said defendant replied that he thought he did, and withdrew from said office; and that the above was the only conversation between the plaintiff and said defendant, and that said language was the language referred to in the letter hereinafter mentioned.

"And plaintiff further says that thereafter and on the eighteenth day of December, 1890, at Portland, Oregon, and at San Francisco, California, and elsewhere, the said defendants falsely, maliciously and wrongfully, and with intent to bring obloquy on the plaintiff, and to bring him into contempt and ridicule, and to damage and injure him in his good name and business and social standing, and his reputation, and to diminish the esteem in which the plaintiff was held by those with whom he did business and the public in general, and to cause this plaintiff to be discharged from his said employment, and to prevent others from employing him in the future, and to deprive plaintiff of the profits and increase of said business, and to destroy said business and to cause the ruin of plaintiff, did compose, write, and publish of and concerning this plaintiff in his said business, employment and calling, the following false, defamatory, and libelous matter, that is to say:

"NEUSTADTER BROTHERS.

"PORTLAND, Oregon, December 18, 1890.

"*Liverpool & London & Globe Insurance Company, Mr. G. Rosenblatt, Agent, City*—DEAR SIR: The insulting remarks offered to our representative manager, Mr. B.

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Neustadter, by your adjuster, O. H. Cole, at his office, in the matter of Le Lee & Co., warrant us to withhold any new business from your local agent here.

“Yours respectfully,

(Signed.)

“‘NEUSTADTER BROTHERS.’

“That the above letter was sent to and received by the agent of said Liverpool, London & Globe Insurance Company at said Portland, Oregon, and at San Francisco, California, and a letter similar thereto in all respects, save the address, was at the same time sent to and received by the agents at Portland, Oregon, and at San Francisco, California, of the Commercial Fire Insurance Company and the Norwich Union Insurance Company aforesaid; and was also sent to and received by divers other persons and insurance companies both at Portland, Oregon, and San Francisco, California, the names of whom are unknown to this plaintiff; and that by reason of the publication thereof as aforesaid, the same has come to the knowledge of divers and sundry other persons and companies with whom the plaintiff had business relations, and by whom plaintiff was well and favorably known, but the names of whom this plaintiff is not now able to state; and that the defendants meant and intended by said letter to impute to this plaintiff lack of business ability and skill necessary to properly conduct his said business, and to adjust said loss and to transact said business of an adjuster of fire losses, and lack of honesty and integrity in his said business, and that plaintiff was not a fit, proper or competent person to be employed in said business, and that if the plaintiff was so employed in the future the defendants would withhold all business and patronage of their own and such business and patronage as they could control from any and all insurance companies continuing to employ the plaintiff; and that the same was so understood by those by whom it was received and to whose knowledge it came as aforesaid.

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"That said matter and said imputations were and are wholly false, untrue, and defamatory, and were and are well known by defendants so to be; that during the time the plaintiff has resided and done business as aforesaid in and about Portland, he has been employed by not less than thirty fire insurance companies as such adjuster, the names of whom are too numerous to state.

"And plaintiff alleges that all of said companies, or nearly so, who had theretofore so employed him, would have continued so to do, had it not been for the said false and defamatory publication; and that in fact the only companies by whom the plaintiff has been employed since the said publication were and are the Liverpool, London & Globe Insurance Company, the New Zealand Insurance Company, the Fireman's Fund Insurance Company, and the Lancaster Insurance Company, and that by reason of the premises, the plaintiff has lost much business and employment which he would otherwise have obtained, and has failed to obtain employment in his said business and calling from those by whom he had formerly been employed except as aforesaid, and from others whose names are unknown to plaintiff, but who would otherwise have employed plaintiff; and that plaintiff has thereby been deprived and will be deprived of such business and employment and the gains and profits thereof and of the reasonable increase thereof which plaintiff would otherwise have enjoyed; and has otherwise been damaged in his business reputation, good name, and social and business standing thereby, and that by reason of the premises the plaintiff has suffered damage in the full sum of five thousand dollars.

"Wherefore plaintiff prays judgment against defendants for the full sum of five thousand dollars, with the costs and disbursements hereof."

The court sustained a demurrer to this complaint on the ground that the complaint does not contain facts sufficient

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to constitute a cause of action, from which judgment the plaintiff has brought this appeal.

J. B. Thompson, and L. L. McArthur, for Appellant.

Cox, Teal & Minor, for Respondents.

STRAHAN, C. J.—There is but one question presented by this appeal, and that is the sufficiency of the complaint. The determination of this question involves a brief examination of the law of libel; but at the threshold we are met by the difficulty that no certain and precise definition of libel, or what constitutes libel, exists. A late writer on the subject says that the attempts which have been made to define libel, or a libel, are so many as to be practically innumerable, yet they have in reality been unavailing; no definition, properly so called, of libel, or a libel, exists. (Townsend. Slander and Libel, § 20.) Many of the attempted definitions are collected by this author in a note to section 21.

It is said that a libel is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent, towards governments, magistrates, or individuals. (*People v. Crosswell*, 3 Johns. Cas. 336; *Steele v. Southwick*, 9 Johns. *214; *Cooper v. Greeley*, 1 Den. 347.) So it is said to be a malicious publication, in writing, signs, or pictures, imputing to another something which has a tendency to injure his reputation, to disgrace or degrade him in society, and to lower him in the esteem and opinion of the world, or to bring him into public hatred, contempt, or ridicule. (*State v. Jeandell*, 5 Harr. (Del.) 475.) Again, it is said that every publication by writing, printing, or painting which charges or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, odious, or ridiculous, is *prima facie* a libel, and implies, malice in the publisher. (*White v. Nicholls*, 3 How. 266; *Dexter v. Spear*, 4 Mass. 115.) Another case says that a publication, to be a libel, must tend to injure the plaintiff's reputation and expose him to public hatred, contempt, and

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ridicule. (*Armentrout v. Moranda*, 8 Blackf. *426.) Other cases say a libel is a malicious publication, expressed either in printing or writing or by signs and pictures, tending to either blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. (*Commonw. v. Clapp*, 4 Mass. 163; 3 Am. Dec. 212; *Root v. King*, 7 Cow. 613.)

It is apparent, from these definitions, that the publication complained of in this case is not libelous *per se*. The argument in this court proceeded on that assumption, and counsel for appellant seemed to concede that unless the alleged libelous matter were in some way aided by the matter alleged by way of inducement, or by the innuendoes, the action must fail. It is the office of the inducement to narrate the extrinsic circumstances, which, coupled with the language published, affects its construction and renders it actionable; when standing alone and not thus explained, the language would appear either not to concern the plaintiff, or if concerning him, not to affect him injuriously. (Towns. Slander and Libel, § 308.) But much of the former prolixity allowed in pleadings in actions for libel and slander is doubtless dispensed with and rendered wholly useless by section 90, Hill's Code, which provides that, in an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but that it may be stated generally that the same was published of or concerning the plaintiff. But the code has not dispensed with the necessity of inducement or innuendoes where they are necessary to show the defamatory meaning of the words. (*Wallace v. Bennett*, 1 Abb. N. C. 478; *Stewart v. Wilson*, 23 Minn. 449; *De Witt v. Wright*, 57 Cal. 576; *Blaisdell v. Raymond*, 14 How. Pr. 265; *Wachter v. Quenzer*, 29 N. Y. 547; *Carroll v. White*, 33 Barb. 615; *Wilson v. Fitch*, 41 Cal. 363; *Frank v. Dunning*, 38 Wis. 270.)

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But in this case, conceding all that is alleged by way of inducement to be true, the writing does not appear to have been defamatory or libelous. It is by the innuendo, taken in connection with the inducement and the alleged libelous matter, that the plaintiff seeks to sustain his complaint. In this class of actions, the ordinary rule undoubtedly is, that the words claimed to be libelous are to be construed according to their ordinary and usual import and meaning. It is only where the meaning is doubtful or equivocal that the pleader may by innuendo point the language to the sense in which he wishes it to be understood. (Towns. Slander and Libel, § 142.)

The libelous words charged are: "The insulting remarks offered to our representative manager, Mr. B. Neustadter, by your adjuster, O. H. Cole, at his office, in the matter of Le Lee & Co., warrant us to withhold any new business from your local agent here." (Innuendo, "that the defendants meant and intended by said letter to impute to this plaintiff a lack of business ability and skill necessary to properly conduct his said business and to adjust said loss, and to transact said business of an adjuster of fire losses; and lack of honesty and integrity in his said business; and that the plaintiff was not a fit, proper or competent person to be employed in said business; and that if the plaintiff was so employed in the future, the defendants would withhold all business and patronage of their own, and such business and patronage as they could control from any and all insurance companies continuing to employ the plaintiff; and that the same was so understood by those by whom it was received and to whose knowledge it came as aforesaid.")

The office of an innuendo in pleading is well understood. It may serve for an explanation, to point a meaning where there is precedent matter expressed or necessarily understood or known, but never to establish a new charge. It may apply what is already expressed, but cannot add to, enlarge or change the sense of the previous words. (*Bar-*

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ham v. Nethersole, Yelv. 22; *Van Vechten v. Hopkins*, 5 Johns. 211; 4 Am. Dec. 339; *Hays v. Mitchell*, 7 Blackf. 117; *Patterson v. Edwards*, 2 Gilm. 720; *Weed v. Bibbins*, 32 Barb. 315; *Thomas v. Crosswell*, 7 Johns. 264; 5 Am. Dec. 269; *McClaghry v. Wetmore*, 6 Johns. 82; 5 Am. Dec. 194; *Holton v. Muzzy*, 30 Vt. 365; *Bell v. Sun. Print. & Pub. Co.* 3 Abb. N. C. 157.)

The colloquium, or matter by way of inducement, is pleaded at great length in the complaint, but there are no facts alleged tending to show that the language used in the alleged libel could have any such signification as is averred in the innuendo. The words themselves have no such import, and the extrinsic facts alleged do not show that they were used in any such sense. The words are not equivocal in themselves, have no covert meaning, are plain and unambiguous. In such case they must be taken to have been used in the ordinary signification, and no authority can be found for allowing their meaning to be totally changed by means of an innuendo. The words make no defamatory charge against the plaintiff. For a reason which appeared sufficient and satisfactory to the defendants, they proposed in future to withhold new business. This they had the right to do, whether the reason given was such as ought to have influenced business men or not. They had the right to do it without giving any reason. (*Payne v. The W. & A. R. R. Co.* 13 Lea, 507; 49 Am. Rep. 666; *Cooley, Torts*, 278, 688.)

In whatever light the appellant's contention may be regarded, we think it is not sustained by authority, and that the court below did not err in sustaining the demurrer, and its judgment must be affirmed.

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[Filed April 5, 1892.]

SAVERIO FIORE v. LADD & TILTON.

BANKS—DEPOSIT IN ASSUMED NAME—CERTIFICATE OF DEPOSIT.—Where, in the regular course of business and without any circumstances tending to rouse suspicion, a bank receives from a stranger money which he deposits in a name assumed by him, the bank is authorized to repay him the money on the return of its certificate of deposit issued in the transaction, endorsed by the person making the deposit, although the endorsement be in the assumed name, and the money in fact belonged to the person whose name the depositor wrongfully assumed, unless before such repayment something occurs to indicate the true ownership or put the bank on inquiry thereabout.

FRAUD—NEGLIGENCE—GOOD FAITH.—Where A, either negligently or intentionally gives the control of his property to B, and thus places him in a position to defraud C in relation thereto, if a loss occur thereby without the fault of C, it should fall on A as between him and C, because the act of A facilitated the fraud.

PRACTICE IN SUPREME COURT—BILLS OF EXCEPTIONS—STATEMENT OF EVIDENCE.—It is unnecessary to recite in a bill of exceptions more of the testimony than is necessary to explain the objection to be urged on appeal. *State v. Drake*, 11 Or. 396, and *Janeway v. Holston*, 19 Id. 97, followed and approved.

Multnomah county: E. D. SHATTUCK, Judge.

Defendants appeal. Reversed.

S. B. Linthicum, for Appellants.

U. S. Grant Marquam, for Respondent.

BEAN, J.—This is an action to recover eight hundred dollars on a certificate of deposit issued by defendants as bankers on the thirteenth day of April, 1891, in the name of Saverio Fiore, which, as plaintiff claims, defendants afterwards wrongfully paid and cancelled. There was a judgment below for plaintiff, from which defendants appeal. The facts are these: On April 13, 1891, plaintiff, who is an Italian, and can neither read nor write, and only speak the English language with difficulty, having on deposit with the Portland Savings Bank the sum of eight hundred dollars, was advised by a fellow countryman named Antone to withdraw his money from this bank and deposit it with

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22 490
29* 435
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22 202
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defendants. Acting upon this advice, the money was withdrawn from the Portland Savings Bank, and plaintiff, accompanied by Antone, went into the bank of defendants for the purpose of depositing the money, where it was placed on deposit. As to who had possession of and delivered the money to the teller of defendants, and what transpired at the time, there is a direct conflict in the testimony between the plaintiff and the teller, who are the only witnesses testifying on that subject. The plaintiff says he took the money, which was tied up in a handkerchief, from his pocket, and delivered it to the teller, saying he wanted to place it on deposit for three months; that the teller received the money from and delivered to him the certificate of deposit described in the complaint, and requested him to write his name in the signature book for identification, but he informed the teller he could not write, and offered to make his mark in the book. Antone, who was present, then spoke up and said: "I will write his name," and the teller allowed him to write the name Saverio Fiore in the signature book. He did not know the use of the signature book, or that Antone wrote the name Saverio Fiore as and for his signature. Afterwards, Antone, through fraud, obtained the certificate, forged his name thereon, presented and received payment thereof.

The teller testifies, that on the day named, the man the plaintiff calls Antone and plaintiff, both of whom were entire strangers to him, came to the bank together. Antone had possession of and delivered to him the money, saying he wanted to desposit it for three months, giving his name as Saverio Fiore, and wrote this name in the signature book, which is used as a means of identifying depositors. The certificate of deposit described in the complaint was thereupon issued and delivered to Antone, and the two men left the bank together. Two or three hours afterwards, Antone, with whom he had all the dealings, and whom he supposed owned the money, returned, saying he

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had found a place where he could invest the money to a better advantage, and requested payment of the certificate, which he presented, endorsed with the name as written in the signature book, and it was thereupon paid and cancelled. During all his transactions with Antone concerning the deposit of the money and the issuance and delivery of the certificate, plaintiff was standing close by and did or said nothing to indicate that he had any interest or ownership in the money. At the time of the deposit of the money and payment of the certificate, the teller supposed and believed that the money belonged to the person making the deposit, and that his name was Saverio Fiore, as he represented, and did not know otherwise until long after the certificate had been paid.

It is also in evidence, and about which there is no dispute, that it is the general custom of banks in the city of Portland, where a person unknown to the bank brings money for deposit, gives a name as his own, and asks for a certificate of deposit, there being no suspicious circumstances, to issue to him such certificate in the name given, upon his signing the signature book, if he can write, without further inquiry, and to pay the money upon the return of the certificate endorsed with the name as written in the signature book; but where the depositor cannot write, it is the custom to ask certain questions, the answers to which are entered in the signature book as a means of identification.

The errors relied on here are in the giving and refusal of certain instructions by the trial court. The defendants requested the court to instruct the jury among other things as follows: 1. If the jury find from the evidence that the money was delivered to the receiving teller by a person other than the plaintiff, and that he deposited the same and signed the signature book, and thereafter returned the certificate of deposit properly endorsed, and received the money therefor, and the bank or the paying teller had no

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reason to believe that he was not the owner thereof, the plaintiff cannot recover. 2. If you find from the evidence that it is a general banking custom, or a custom among the banks of the city of Portland, where a person brings money to a bank and asks for a certificate of deposit, and signs the signature book with a name which is not his own, and which the bank has no reason to believe is not his genuine name, to cash such certificate upon return thereof, with the proper endorsement thereon, without further inquiry, and that such were the facts in this case, such action on the part of the bank does not constitute negligence on its part. 3. If you find from the evidence that the plaintiff came into the bank with a third person in this case, and stood by while the third person deposited the money, signed the signature book, and received the certificate of deposit, without protest or objection on his part, and that the teller of said bank did not know or had no reason to believe that the plaintiff was interested therein, and defendant thereafter repaid the amount of such certificate to such third person upon the return of such certificate by him properly endorsed, plaintiff is estopped in this case and cannot recover.

Each of these instructions being refused, an exception was duly noted and the ruling of the court thereon is now assigned as error. These instructions were designed to state the law as applicable to the facts as contended for by defendants, and we think should have been given. If, as defendants claim, the money in dispute was deposited in the bank by Antone, who represented his name to be Saverio Fiore, which the bank supposed to be true, and the certificate of deposit was issued and delivered to him intending thereby to make it payable to the person to whom delivered, and that he wrote the name Saverio Fiore in the signature book of the bank as and for his genuine signature, and afterwards, upon return of the certificate endorsed with the name appearing in the signature book, the money was paid

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to him without any knowledge that it belonged to some other person, it seems to us clear, in view of the banking custom in such cases, that defendants are not liable to plaintiff in this action, although in fact the money may have belonged to him. Their contract was with the person with whom they dealt and who deposited the money, under the name by which he was known at the time, and their obligation was to re-pay the money to him or his order, upon the return of the certificate properly endorsed. They contracted with him under the name of Saverio Fiore, believing that to be his true name, issued and delivered to him the certificate of deposit in such name, thereby intending to make it payable to the person to whom it was delivered; and although they may have been mistaken in the name of the man, the person with whom they dealt was the person intended by them as the payee of the certificate, designated by the name by which he was known in the transaction; and when he returned the certificate, endorsed with the signature appearing in the signature book, and it was paid, without knowledge of the claim of any other person, and under the belief that the money belonged to him, their contract was complied with. If Antone had possession of the money, deposited it in the bank, and dealt with it as his own, the bank had a right to assume, without further inquiry, unless there was something in the transaction itself to arouse suspicion, that the money belonged to him, and that he was dealing in his true name; and their contract, if the facts are as they claim, was to pay the money to him, or his order, and this they have done, and ought not now to be required to pay it again to a person with whom they had no dealings and who was in no way connected with the transaction. (*Robertson v. Coleman*, 141 Mass. 231; 55 Am. Rep. 471; *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360; 57 Am. Rep. 171; *U. S. v. Nat. Exchange Bank*, 45 Fed. Rep. 163.)

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It is argued, however, that because the certificate of deposit was in terms made payable to Saverio Fiore, the defendants were bound at their peril to see that it was paid to no other person, and it is immaterial from whom they received the money; and this we suppose was the view entertained by the court below, judging from the entire charge to the jury. This would probably be so if the contract had been between the defendants and Saverio Fiore, or had it been intended to make the certificate payable to him, but here, if defendants' contention be true, the contract was with the person with whom they dealt and to whom the certificate was issued and delivered, known in the transaction as Saverio Fiore, and with no other person; nor was it intended that the certificate should be paid to any other person, unless by the order of the person dealing with the bank. The obligation of the bank was to pay the money on the order of the person from whom it was received and with whom the contract was made, under the name by which he was known at the time. While a bank may be bound at its peril to see that the money of a depositor is only paid to himself or order, it may safely assume, without further inquiry, in the absence of suspicious circumstances, that the name by which the depositor, if a stranger, is known in transaction is his true name.

The question in this case is, with whom did the bank deal, and who was intended as the payee of the certificate? The name is only one means of determining that fact. The name used in a transaction is only one means of identifying the person, and is often not the safest and best. As was said in *Robertson v. Coleman*, *supra*, "The name of a person is the verbal designation by which he is known, but the visible presence of the person affords surer means of identifying him than his name." This is not a case where a person known to the bank represented a third person; but according to the defendants' contention is one in which the bank was dealing with a person under the

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assumption justified by the circumstances of the transaction, that he had given his true name, and was the owner of the money and entitled to deposit and draw it, and this question ought to have been put to the jury.

There is yet another reason why it seems to us these questions should have been submitted to the jury. If, as defendants contend, the money was in the possession of Antone, and by him deposited in the bank, it was with the knowledge and consent of plaintiff, who was present at the time, and who thereby, either negligently or intentionally, placed Antone in a position to perpetrate a fraud upon the bank; and in such case the loss should fall upon the one who has been the occasion of it. Allowing that plaintiff intended no wrong by suffering Antone to deal with the money as his own, and that neither he nor the bank was at fault in the matter, the loss should fall upon him, because by his act he facilitated the fraud. (*Stout v. Benoit*, 39 Mo. 277; 90 Am. Dec. 466.)

In the language of Lord Mansfield, in *Price v. Neal*, 3 Burrows, 1357, "It is a misfortune which has happened without the defendant's fault or neglect. If there were no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man. But in this case, if there were any fault or negligence of any one, it certainly was in the plaintiff and not in the defendant."

That portion of the instruction of the court, that the man who controlled the money, whether he was accompanied by other persons or not when he went into the bank, and who negotiated with and delivered the money to the teller, might properly be deemed by the bank the owner of the money, and if the bank people, notwithstanding this fact, accepted and acted upon the statements of Antone, it was a question for the jury, whether in so doing they exercised reasonable diligence, was, we think, when viewed in the light of the entire charge and plaintiff's

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testimony, a presentation of the case as made by plaintiff, and no error of which defendants can complain. If plaintiff was in possession of the money, and delivered it to the teller for deposit, and the teller allowed Antone to write plaintiff's name in the signature book, as and for his signature, it was perhaps a question for the jury whether the teller exercised reasonable care and diligence in so doing, although from the evidence in this case, it would seem there is but little room for controversy on that question.

At the argument we were urged to affirm the judgment in this case for informality in the bill of exceptions, in stating all the evidence given on the trial as extended from the stenographer's notes in place of only so much thereof as is necessary to explain the exceptions taken; but as the errors relied on are in the giving and refusal of certain instructions, which are so stated in the bill of exceptions as to be easily understood, we do not feel justified in refusing to examine them, but cannot refrain from condemning the practice which seems to be frequently adopted, of making a part of the bill of exceptions all the evidence given on the trial when no questions are presented for review calling for an examination of the evidence. This practice is in disregard of the plain provisions of the statute, Code, § 232, as well as all rules governing the preparation of bills of exceptions. (*State v. Drake*, 11 Or. 396; *Janeway v. Holston*, 19 Or. 97.) It is unnecessarily expensive to litigants, and imposes the arduous task upon this court of examining a vast amount of irrelevant and immaterial matters. The bill of exceptions in this case contains of evidence over sixty type-written pages, while the facts upon which the questions sought to be reviewed are founded could have been more clearly and intelligibly stated in two or three. Such a practice ought not to be encouraged; and in taxing costs in this court the clerk

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will be directed not to allow anything on account of the evidence contained in the bill of exceptions.

The judgment is reversed and a new trial ordered.

[Filed April 5, 1892.]

IN RE ESTATE OF WARREN H. MILLS, DECEASED.

EXECUTORS AND ADMINISTRATORS—FAILURE TO FILE INVENTORY—REMOVAL—

A failure to make and return an inventory of the estate by an executor or administrator, within the time allowed by law, is a violation of duty for which he is subject to removal.

ADMINISTRATOR—TRUSTEE—PROPERTY OF ESTATE—CONFLICTING CLAIMS—

An administrator is a *quasi* trustee, and should be a person who is not interested adversely to the estate in property which is the subject of administration, and who will, while carefully guarding the interests of the estate, stand at least indifferent between it and claimants of the property.

Klamath county: L. R. WEBSTER, Judge.

Plaintiff appeals. Reversed.

Frank V. Drake, for Appellant.

N. B. Knight, for Respondent.

BEAN, J.—This is a proceeding for the removal of an administrator for a failure to file an inventory of the estate of his decedent. On January 22, 1890, W. H. Mills died seized and possessed of a large amount of property in Klamath county, Oregon, leaving as his sole heir his son Warren F. Mills, who intermarried with the petitioner herein and died in November following, leaving his wife as his devisee. At the time of his death, W. H. Mills and one J. B. Rider owned a large amount of real estate, and were equal partners in the business of farming, and raising, buying and selling stock, and by their lessee were in possession of personal property of the probable value of four thousand dollars. On July 21, 1890, Fred H. Mills was duly appointed administrator of the estate of W. H. Mills, qualified and entered upon the discharge of his duties, but

22	210
136	279
136	283
22	210
37	611
23	210
40	429

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in the inventory filed by him, failed and neglected to include any of the personal property in the possession of W. H. Mills at the time of his death. As a reason for omitting this property from the inventory, the administrator claims to have purchased it from Warren F. Mills subsequent to the death of his father and of his appointment as administrator. By reason of such purchase, he now claims to be the owner of the property, that it does not belong to the estate, and therefore should not be included in the inventory.

The contention of the petitioner is, that the alleged purchase by the administrator of Warren F. Mills was not in fact made; and if it were, the heir had no interest in the property which he could convey pending the settlement of the estate, and that the administrator is prohibited by law (Hill's Code, § 1162) from purchasing property belonging to the estate.

A vast amount of testimony has been taken and is in the record, and learned and exhaustive briefs have been filed, as well as oral arguments made, touching the questions thus suggested; but in the view we have taken of this matter, it is unnecessary for us to enter upon an examination of the validity of the alleged sale by Warren F. Mills to the administrator. *In re Holliday Estate*, 18 Or. 168, it was held by this court that a failure to make and return an inventory of the estate by an executor or administrator within the time allowed by law, is a violation of duty for which he is subject to removal. At the time of the death of W. H. Mills, he was in possession and at least *prima facie* the owner of this property, and it should have been included in the inventory of his estate; and for an intentional neglect so to do, the administrator is subject to removal, under the decision mentioned.

In addition to this, it is apparent from the mere statement of the claims of the petitioner and the administrator, that there is a direct conflict in interest between the estate

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and Fred H. Mills, and that he cannot act indifferently in the matter. An administrator stands in the position, so to speak, of a trustee, and should be a person who can and will carefully guard the interests of the estate, and at least stand indifferent between it and claimants to the property. This Fred H. Mills cannot do; and he must necessarily, if allowed to act as administrator, sacrifice the interests of the estate, if any, in this property, or his own interests, and it is expecting too much of human nature to assume the latter. We do not conceive this to be a proper proceeding in which to try the question of the title to this property, and therefore do not express or indicate any opinion thereon; nor as a fact have we examined the testimony further than to see that there is a real and substantial controversy, and one which must be tried in the proper forum, the estate being represented by some person as administrator who is in a position to assert its rights, if any. It is sufficient for us to know that the interests of Fred H. Mills as an individual and as administrator are so antagonistic that they cannot be represented by the same person.

It follows, therefore, that the decree of the court below must be reversed, and this cause remanded with directions to the county court to remove the administrator and appoint some suitable person in his place.

[Filed April 5, 1892.]**R. G. McDONALD v. R. J. HOLMES.**

PARTNERS—JOINT DEBTORS—STATUTE OF LIMITATIONS.—It is a general rule, that a joint debtor may, as soon as he has paid more than his share of any single joint debt, enforce contribution from his fellow-debtor as to that debt; but as between partners, this principle does not apply, the rule in such case being, that no cause of suit or action arises in favor of one against the other for contribution, and the statute of limitations does not begin to run, until the partnership business is fully settled and a balance in favor of one or the other ascertained, notwithstanding the partnership itself may have been previously dissolved.

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Multnomah county: L. B. STEARNS, Judge.

Plaintiff appeals. Affirmed.

Milton W. Smith, and *Walter S. Perry*, for Appellant.

F. R. Strong, for Respondent.

LORD, J.—This is a suit in equity, brought by the plaintiff against the defendant to compel contribution on account of the payment by him of a certain judgment obtained against the plaintiff and defendant as partners. It appears from the complaint that the plaintiff and defendant were equal partners during the year 1881, and for some time prior thereto, doing business under the firm name of R. G. McDonald, and that they failed in business, owing considerable sums of money to various individuals and firms; that among those having claims against the firm of R. G. McDonald were Oberfelder Bros. & Co., who, on the seventh day of March, 1882, obtained judgment against the plaintiff and defendant as partners for the sum of one thousand two hundred and sixteen dollars and eighty-eight cents, and twenty-one dollars and seventy-five cents costs and disbursements; that the said judgment was duly entered in the proper records and kept in full force and effect; that on the fifth day of September, 1890, an execution was issued in favor of the said Oberfelder Bros. & Co., and that the same was duly paid thereunder by the plaintiff, amounting to the sum of one thousand eight hundred and seventy dollars and twenty-nine cents. It is to recover one-half of this sum, so paid by the plaintiff, with interest at six per cent from the last date aforesaid, that this suit is brought.

The defendant answered, and set up as a separate defense in substance that the plaintiff and defendant were equal partners engaged in business in the city of Las Vegas in the territory of New Mexico, and that sometime in July, 1881, as such partners, they failed in business and became insolvent, owing to divers persons divers and sundry sums

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of money; that since said date the defendant had paid on account of said partnership to the creditors of said firm the amounts hereinafter specified, interest included, which, for brevity, may be thus tabulated:

1881, December.	J. C. Brunner & Co.	\$122 61
1882, January.	Gunther & Co.	755 43
1881, February.	} Craft, Holmes & Co.	156 94
1881, November.		
1882, February.		
1882, June.	C. F. Herman	78 88
1882, July.	Udell, Schemening & Co.	45 00
1883, April.	J. P. Campbell	32 00
1882, October.	} A. Mau & Co.	158 40
1882, December.		
1883, April.		
1882, January.	} Cook & Bernheim	199 56
1882, December.		
1883, June.		
1882, July.	} Charles Bebstock & Co.	150 57
1883, June.		
1883, July.		
1883, July.	F. M. James & Son	5 00
1882, March.	} Philip Best Brewing Co.	595 56
1883, March.		
1884, March.		

That all said payments were made for and on account of the indebtedness of said firm, composed of the plaintiff and defendant, and are a part of the same transaction set forth by the plaintiff in his complaint, and that plaintiff is liable to the defendant for one-half the sum or sums paid, etc., but that plaintiff has not paid defendant any part or portion of said sum or sums of money, etc.

There is another separate defense set up, but the view we take of the case renders its statement unnecessary.

The plaintiff demurred to all the new matter set up in

the answer upon the grounds, (1) of the insufficiency of the facts alleged, and (2) the statute of limitations. The demurrer was overruled by the trial court, and from the judgment rendered thereon this appeal is taken. The contention for the plaintiff is, that when the partnership was dissolved it terminated the relation of the parties as partners, and that thereafter they stood to each other in the relation of one joint debtor to the other as to the liabilities of the firm. Hence, he claims that this is a suit by one of two joint debtors against his fellow-debtor to recover contribution for one-half of a joint debt paid by him, and that the items set up by the defendant in his separate defense are simply claims for contribution by one joint debtor against another; and consequently, upon the theory, as we suppose, that each debt at the date of its payment represented a cause of suit for contribution, the statute began to run against each debt when paid. But we do not so understand the law.

In the absence of any arrangement as to existing liabilities after dissolution, the partnership relation between the partners remains until the partnership affairs are adjusted. A debt due by the firm is a partnership debt as much after the dissolution as before it, as in like manner property owned by the partnership remains partnership property until disposed of or segregated. The interest of a partner in the partnership property is not in any particular part or portion of it, but his share is in the balance remaining after the payment of the partnership debts, and after the settlement of the accounts between the several partners. "For," as HOUCK, J., said, "his co-partners have a specific lien on his share of the assets of the partnership to secure his indebtedness to the firm; and in the ascertainment of his interest in the property of the firm, his indebtedness thereto must be taken into account and settled out of his share." (*Over v. Hetherington*, 66 Ind. 369.) Nor is there any implied promise, when a partner pays a debt of the

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firm, that his co-partners shall pay him their proportion of the debt so paid as it exists between joint debtors when one joint debtor pays the joint debt. "Where two independent parties owe a joint debt," said the court in *White v. Harlow*, 5 Gray, 468, "and one pays the whole, which he may be compelled to do by the creditor, the law, in the absence of any express agreement of such debtors, implies a promise of the co-debtor to him who has thus paid the whole, to pay him one-half of the common debt thus discharged. But when one partner thus pays the whole debt, the law implies no such promise; it merely authorizes him to charge the whole to the firm in the partnership account of which he will have the benefit as a credit on settlement of that account voluntarily or by a suit in equity." The difference grows out of the legal relation of the parties. Partnership transactions are not a disjointed collection of distinct and separate matters. "No partner," says Mr. PARSONS, "has a several and personal claim on any other partner for any matter in which the partnership is interested, because neither can the partners be separated, all being interested both as plaintiffs and defendants, nor can any claim or item of claim be separated from the other interests of the partnership. One partner may to-day pay much more or much less than the sum which would fall upon him to pay in proportion, either to the number of the partners, or to his share or interest in the concern. But yesterday he may have done just the reverse; and the charge or credit of yesterday must be brought into connection with the charge or credit of to-day, before it can be ascertained whether he has paid too much or too little, and therefore whether he may claim of the other partners or they of him. But, to settle this question finally and justly, the charges and credits of all other days, and not only so, but of all the other partners, must be taken into consideration, before it can be ascertained whether the plaintiff has a valid claim against the defendant." (Pars. Part. *268.)

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Nor can one partner, who has paid a partnership debt, sue his co-partner for contribution, without showing that the partnership affairs have been fully settled. The right depends upon the state of accounts then existing. "One partner," said ELLIOTT, J., "who pays a partnership debt, cannot sue his co-partner for contribution without showing that the partnership affairs have been fully settled. It may be true that a partner has paid all of a specific partnership liability and yet be indebted to his associate. The right to compel contribution depends upon the state of the accounts between the parties upon the adjustment of all partnership affairs. * * * The reason of this rule is, that until all the partnership affairs are adjusted, there can be no adjudication of the rights of the parties as to one only of an entire series of transactions. In order to determine the rights of the partners as to one of many partnership transactions, it is necessary to know their rights as to all, for the partnership business is a continuous thing, not a broken and disjointed collection of distinct and separate affairs." (*Crossley v. Taylor*, 83 Ind. 337.) When the affairs of a partnership have been adjusted and settled, and a balance appears in favor of one of the partners, a suit for contribution lies as well in equity as at law, for the remedies are concurrent. (*McGunn v. Hanlin*, 29 Mich. 476.) Hence, one partner cannot sue another for his share of any particular debt or transaction while the partnership accounts are unadjusted, although the firm may have been dissolved. (*Harris v. Harris*, 39 N. H. 45.) The conceded facts in this case show that the partnership has been dissolved, but that there has been no settlement or winding up of the partnership affairs between the partners so as to show what, if anything, is due from one to the other. In such case, one partner cannot sue the other for contribution, either at law or in equity, for any matter or transaction connected with the co-partnership, until the partnership affairs have been adjusted and a balance found due from one to the other.

Points decided.

One partner may sue another at law where the cause of action was never connected with the partnership, or has been separated from it by explicit acts, or where the partnership is confined to a single transaction. (*Lawrence v. Clark*, 9 Dana, *257; 35 Am. Dec. 133.)

Mr. Justice STORY says: "The cases in which a recovery can be had at law by way of contribution between partners are very few, and stand upon special circumstances. The usual, and indeed almost the only, effectual remedy is in equity, where an account of all the partnership transactions can be taken." (1 Story Eq. Jur. § 504.)

As this suit is by one partner against the other to compel contribution for the payment of a partnership debt, when the facts show that there has been no accounting or settlement of the partnership affairs, it results that it cannot be maintained, unless the suit is allowed to embrace an accounting and full settlement of the partnership affairs, and then only to recover such excess as appears after such accounting and settlement that the plaintiff has paid beyond his share. Until this balance is ascertained in favor of one or the other partner, there exists no cause of action for contribution; and until a cause of action exists, the statute of limitation does not begin to run.

There was no error in overruling the demurrer.

[Filed April 5, 1892.]**JAMES A. RUTHERFORD ET AL. v. J. W. HILL ET AL.**

INCORPORATORS—PARTNERS—ASSUMING CORPORATE NAME.—Where three or more persons execute and file articles of incorporation under the laws of this state, and do nothing further toward effecting an organization or carrying on the proposed business, they do not thereby become liable as partners, although one of them assumes to do business under the proposed corporate name and incurs liabilities in that name.

Multnomah county: E. D. SHATTUCK, Judge.

Defendants appeal. Reversed.

Statement of the case.

The defendants are sued as partners under the name and style of the Himes Printing Company. The complaint does not anywhere allege that the defendants entered into an agreement of co-partnership, but in lieu thereof the following facts are alleged: "That the defendants, on or about the fifth day of September, 1890, executed, acknowledged, and filed in the office of the clerk of the county court of Multnomah county, and in the office of the secretary of state at Salem, Oregon, certain articles of incorporation as the Himes Printing Company; that the defendants, in violation of the laws for the formation of corporations subsisting in the state of Oregon, negligently failed to provide a stock-book and to secure stock subscriptions to said corporation; that in spite of their said violation of the law, the defendants undertook to carry on the business provided for in said articles of incorporation, appointed one George H. Himes superintendent of their said business, and authorized him and the defendant Sherman Martin to represent them in all the transactions of said business; that said business was carried on under the firm name and title of the Himes Printing Company; that between May 1, and September 1, 1891, the plaintiff, at the instance and request of the defendants, through their agents, the aforesaid Himes and the defendant Martin, performed certain labor and services for the defendants, of the reasonable and agreed value of two hundred and thirteen dollars and fourteen cents, which sum the defendants promised to pay; that the plaintiffs performed the aforesaid work, relying on the credit and representations of the defendants for their payment."

Earhart and Hill answered separately, and each of them denied every material allegation of the complaint, except they did not deny executing and filing the articles of incorporation of the Himes Printing Company.

The jury returned a verdict against the defendants Earhart and Hill for the amount claimed, and a judg-

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ment was entered thereon, from which this appeal was taken.

George H. Durham, and J. F. Watson, for Appellants.

Wallace McCammant, for Respondents.

STRAHAN, C. J.—At the conclusion of the evidence, the defendants Hill and Earhart asked the court to instruct the jury as follows: “1. The execution and filing of the articles of incorporation of the Himes Printing Company by said Hill and Earhart, in connection with the defendant Sherman Martin, would not itself make them partners with Martin, or render them liable in this action. 2. Said defendants Hill and Earhart cannot be charged in this action unless it has been shown by a preponderance of the evidence that they had notice of their being held out as such partners, and plaintiffs also had notice thereof before or at the time they performed the labor and services alleged in the complaint and performed the same on the faith thereof. 3. The plaintiffs cannot recover in this action against Hill and Earhart, unless it has been proved by a preponderance of the evidence that said Hill and Earhart were partners in said printing company at the time the contract for said labor and services was entered into, or at the time the same were performed, or at the time the contract was entered into, or said labor and services performed, undertook to carry on said business of said company, or were interested as partners or appointed or participated in the appointment of George H. Himes as superintendent of said business, or authorized him or said Martin to represent them in the transaction of said business, or requested through said Himes or Martin the plaintiffs to perform said labor and service.” No. 4 was in effect a direction to the jury to return a verdict for the defendants Hill and Earhart. The defendants excepted to the rulings of the court in refusing to give each of the foregoing instructions.

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The court then instructed the jury as follows: "I cannot agree with you, Mr. Durham and Judge Watson, that there may not be some other reasons why parties should not be bound than such as usually arise from an estoppel. Since this case has been going on, it has occurred to me whether or not this may not furnish a class of itself for pronouncing a man to be a partner. As a general rule, the doctrine of estoppel has got to be made out according to the authorities you have read; but I am inclined to the opinion that the mere act of filing articles is itself a holding out and notice to the world that they are associated in the business that is carried on under the name. I do not feel very certain about it, but my best conception of this matter is that it ought to be considered the rule." An exception to this instruction was duly noted. The court also gave the following instruction: "If you find from the evidence in this case that these two defendants and Sherman Martin filed articles of incorporation for the purpose of carrying on the printing business under the name of the Himes Printing Company, and that thereafter one of these men, to-wit, Sherman Martin, took up the business contemplated by this corporation, and carried it on under that name, and incurred liabilities, then all these incorporators that signed the articles are liable, and your verdict should be for the plaintiffs for the amount claimed, provided you further find that, before they performed the labor and rendered the services, they ascertained the fact of these articles being filed, and acted on the faith of the association of these defendants with Sherman Martin, and that they were induced thereby to perform the labor and render the services." An exception was also taken to this instruction.

There was no evidence whatever before the jury that these defendants had anything to do with the business of the Himes Printing Company, or in any way authorized the same, except to sign the articles of incorporation. They appointed no agents and employed no laborers, purchased

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no material, nor did they have any knowledge that any business was conducted under that name, except the company did some printing for the defendant Hill; and when a bill was presented to him for the same it had at the top, printed in bold letters, "The Himes Printing Company, incorporated; Geo. H. Himes, Superintendent; Sherman Martin, Manager." There was no evidence before the jury that the plaintiffs had any actual knowledge of the filing of the articles of incorporation at the time they performed the services sued for.

The sole question, therefore, seems to be whether or not, where three or more persons sign, acknowledge, and file articles of incorporation under the laws of this state, and do nothing further towards effecting an organization or carrying on the proposed business, and one of them assumes to do business under the proposed corporate name and incurs liabilities, the other persons who signed said articles are liable. Appellants maintain that in such case there is no liability on the part of those who do not participate in the business either directly or indirectly, while the respondents seek to maintain the reverse of this proposition; and this contention presents the only question we need consider on this appeal.

The respondent contends that the executing and filing of the articles of incorporation and the assumption of the corporate name by one of the parties under which he does business, create a partnership between all the persons signing said articles; and to sustain this view he relies upon these authorities: *Whipple v. Parker*, 29 Mich. 369; *Jessup v. Carnegie*, 44 N. Y. Sup. Ct. 260; *Coleman v. Coleman*, 78 Ind. 344; *Pettis v. Atkins*, 60 Ill. 454; *Smith v. Warder*, 86 Mo. 382; *Garnett v. Richardson*, 35 Ark. 144; Lind. Part 5; *Abbott v. Omaha Smelting Co.* 4 Neb. 416; *Johnson v. Corser*, 34 Minn. 355. Some other authorities similar to these in principle, might be cited, but they add nothing to this side of the question. Without stopping to distinguish

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these cases from the one now before us, we think the decided weight of authority, as well as the better reason, is the other way. *Fay v. Noble*, 7 Cush. 188, is an early case in which it was held that the subscribers for and holders of stock in a manufacturing corporation, which has been defectively organized and transacted business under such defective organization, do not thereby become partners, general or special, in such business. In *Trowbridge v. Scudder*, 11 Cush. 83, it was held that the stockholders of a corporation do not become liable as partners on notes given by the treasurer of the corporation, merely because after organizing they transacted no business. In *First Nat. Bank v. Almy*, 117 Mass. 476, it was held that the members of a corporation were not liable as partners by reason of having transacted business before the whole capital stock was paid in as required by statute. In *Humphreys v. Mooney*, 5 Col. 282, in considering the question now before the court, it was said: "The doctrine of a partnership liability in such case is not founded in law reason, and is repugnant to the very purposes of the statute authorizing a corporation, one object of which is to limit individual liability." Substantially, the same doctrine is announced in *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197; *Planters' etc. Bank v. Padgett*, 69 Ga. 159; *Stafford Nat. Bank v. Palmer*, 47 Conn. 443; *Ward v. Brigham*, 127 Mass. 24; *Central etc. Bank v. Walker*, 66 N. Y. 424; *Jessup v. Carnegie*, 80 N. Y. 441; 36 Am. Rep. 643; *Blanchard v. Kaull*, 44 Cal. 410; *Morawetz Corp.* § 743. And 17 Am. & Eng. Ency. Law, 866, after stating that the rule contended for by respondents had been adopted by quite a large number of cases, remarks: "But the weight of authority perhaps sustains the contrary rule, that if they were acting under the supposition that they were incorporated, and were assuming only the liability of stockholders, and not that of partners, they will not be held liable as such"; and a long list of cases is cited to sustain this proposition.

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It is not doubted that cases might arise and can readily be imagined where the incorporators sought to be charged might take such part in conducting the business, or hold themselves out to the world as partners or as principals in the business, that they would be held liable; but this would grow out of their conduct in carrying on the business, and not out of the mere fact of signing and filing the articles. If the appellants could be held liable in this case, such liability would rest on the mere act of signing and filing the articles, and not upon any participation in the business, either directly or indirectly. It would have to rest upon the theory, that by the mere signing the articles with Martin, they constituted him their general agent to proceed to conduct the business contemplated by the proposed corporation, thus creating a liability for any act of his done within the scope of the powers of the proposed corporation.

No authority to which our attention has been directed, has gone so far, and we feel safe in saying that none can be found to support that doctrine. We therefore reverse the judgment, and remand the cause for such further proceedings as are not inconsistent with this opinion.

[Filed April 5, 1892.]

K. M. RYBERG v. THE PORTLAND CABLE RAILWAY COMPANY.

PRACTICE—NONSUIT—CASE IN JUDGMENT.—It appearing from an examination of the record in this case, that there was some evidence on the part of plaintiff, however slight, to sustain the verdict, *held*, that it was not error in the court below to deny the motion of defendant for a nonsuit.

Multnomah county: E. D. SHATTUCK, Judge.

Defendant appeals. Affirmed.

This is an action to recover damages for negligence. After alleging the corporate existence of the defendant, the complaint proceeds: "That on the second day of May,

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1891, the plaintiff, who is an expressman, and was such at the time of the happening of the injury hereinafter referred to, was lawfully driving along Fifth street, a public street of the city of Portland, with his express wagon and one horse; that while so passing along he approached a deep hole, which had been negligently left open by the said defendant corporation in its turntable, which was on said street, and of the existence of which the plaintiff was without knowledge until his near approach thereto, and of the existence of which the said defendant had full knowledge; that there was no sign or notice of the existence of such dangerous place in said street at the time of the plaintiff's said approach; that the plaintiff was compelled, in order to avoid entering said hole, to turn his horse and wagon across the track of the said defendant, and that while so doing and in the exercise of due care and caution, and while exercising every exertion to avoid a catastrophe, and while going in the only direction in which such accident might be avoided, his said wagon was, by the approaching car of said defendant, negligently, carelessly, and without due care and caution, run into, overset, broken, and damaged, and the plaintiff himself was thrown out over the seat upon said wagon, and his face and body severely bruised, and he was made sick and sore, and will for some time so continue." There was a further allegation of damage in the sum of fifty dollars for injury to wagon, and damage in the sum of fifty dollars because "he will be prevented from using his said wagon, by means of which he earns his livelihood, for the space of two weeks," and injuries to himself, in all, two hundred and fifty dollars.

The defendant's answer, after alleging its right and franchise duly granted by the city of Portland to run its cars on said North Fifth street, proceeds: "And defendant further alleges, that on the second day of May, 1891, under and by virtue of said power, and for a long time prior

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thereto, it was operating street cars by cable along North Fifth street in said city, under and by virtue of its said franchise, having constructed its street railway along said street to a point near H street, where, for the necessary operation of its said railway and cars, it had constructed a turntable; that in said table there was a trapdoor of sufficient size to admit the person of a man to descend beneath said table to oil the machinery and remove filth and dirt that will accumulate beneath the same; that on said second day of May, 1891, at about the hour of eleven o'clock in the forenoon, two of its employés were engaged in removing the dirt from beneath said table, one being beneath the same and the other standing at the trapdoor, which was then open and on the west side of said turntable; that while so engaged, and while a car of the defendant was just entering upon said turntable, the plaintiff, although warned by said employé, who was standing at said trapdoor, not to approach, which said warning was given while the plaintiff was more than twenty feet away, and while there was plenty of room on the east side of said street to pass, which said east side was then unobstructed, negligently, wilfully, and unnecessarily attempted to pass between said open trapdoor and said car of the defendant; that in so doing, plaintiff ran into the car of defendant, broke the end thereof, and marred and injured the same to the extent of twenty-five dollars; that the approach of the plaintiff at said time was without cause and unexpected, so that said car, although moving slowly, could not be entirely stopped; that plaintiff was driving at a good speed, but had plenty of time to either entirely stop before reaching said turntable or to turn to the easterly thereof; that defendant has been compelled to repair said car at a cost of twenty-five dollars." The reply denied the new matter in the answer. A trial before a jury resulted in a verdict and judgment for the plaintiff, from which defendant appealed.

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During the progress of the trial in the court below, and at the conclusion of the plaintiff's evidence, the defendant moved for a nonsuit, for the reason the plaintiff's evidence did not prove a case sufficient to be submitted to a jury; which motion being overruled, an exception was duly taken.

H. H. Northup, for Appellant.

McGinn, Sears & Simon, for Respondent.

STRAHAN, C. J.—There is but one question presented by this record, and that is, the action of the court in overruling the defendant's motion for a nonsuit, made at the conclusion of the evidence on the part of the plaintiff. This motion brings up the evidence on the part of the plaintiff, and requires us to say whether or not there was any evidence before the jury at the time the motion was made, taking the most favorable view of it, that would justify a verdict in favor of the plaintiff. In disposing of this motion, we are to assume that the witnesses were credible and that their statements as given are true.

The appellant's contention is directed to two points. First, that there was no evidence before the jury showing that the appellant was negligent at the time of the injury; and, second, that the evidence introduced on the part of the plaintiff shows that he was guilty of negligence directly contributing to the injury. We have attentively considered the evidence bearing upon the first question; and without attempting to state its effect, there was some evidence, though slight, of negligence on the part of the plaintiff. If, as the evidence tends to prove, the space on the east side of the turntable and between it and the sidewalk was blocked up with another team, it left no passway except over and across the west side of the turntable and a part of the street. If the manhole was open at the time, as is admitted by both sides, it is possible the plaintiff might have approached so near it before discovering it

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that he could neither escape nor recede, under the impression that he would be able to pass on that side; and if there was no one on guard to warn off approaching teams while the hole was kept open, it would probably be such want of care as would subject the defendant to liability in case of injury. And on this theory, though the evidence is not strong, nor if we were called upon to weigh it, at all satisfactory, it was possible for the jury to give it such effect as to find the verdict it did.

On the second question, or the plaintiff's contributory negligence, the same reasoning applies. The manhole being open, and so far as appeared at the time the motion for a nonsuit was made, no one there to guard or give warning to approaching teams, the plaintiff might have advanced so far that the collision was inevitable, under the impression that he could safely pass. We do not say that this is the best or even the most probable or reasonable view of the evidence, but it is one the jury might and probably did adopt; and on this motion we are unable to say affirmatively that they erred. It was their province to take that view of the evidence, if they thought it the most reasonable, and we could not reverse the judgment on that ground without directly invading their province. It is true, when such a question comes before us, and there is no evidence on a material issue, we have several times felt constrained to order a nonsuit; but it has been solely on the ground that there was no evidence before the jury which, within the principles stated, could have authorized or justified a verdict for the plaintiff. In what we have said, no account is taken of the state of the case after the defendant introduced the evidence on its part. We have referred entirely to the evidence on the part of the plaintiff at the time the motion for a nonsuit was made. What verdict the jury ought to have rendered on the whole case, it is not our province to decide. It involves the credibility

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of the witnesses on both sides, as well as the effect of the evidence, which were matters exclusively for the jury.

Finding no error in the judgment appealed from, the same must be affirmed.

[Filed April 5, 1892.]**HARRIET N. MORSE v. I. A. MACRUM ET AL.**

WILLS—CONSTRUCTION—CUMULATIVE LEGACIES—DISTRIBUTION.—A testator, by one clause of his will, directed the sale of certain realty, one-half of the proceeds thereof to be turned over to H., as trustee, and the income thereof to be paid every three months to plaintiff during her lifetime, and made final disposition of the fund after plaintiff's death. By another clause, he bequeathed to H., as trustee, ten thousand dollars, the income thereof to be paid at the end of every three months to plaintiff, she to receive the sum of three hundred and seventy-five dollars per quarter therefrom. If the income derived from said ten thousand dollars does not reach three hundred and seventy-five dollars per quarter, then the deficiency is to be paid out of the residuary estate; *held*, that these are cumulative legacies, and that the deficiency in the income provided for in one clause, if any such deficiency shall arise, must be paid out of the residuary estate, and not out of the property named in the other clause.

ANNUITIES—DEFICIENCY IN LEGACIES—RESIDUARY ESTATE—FINAL SETTLEMENT.—A probable deficiency in an annuity provided for by a will being variable and undetermined in amount, there can be no final settlement of the estate until the death of the annuitant, where the will requires the deficiency to be made up from the residuary estate.

WILLS, WHEN TO TAKE EFFECT.—A will speaks from the death of the testator, and not from its date unless its language, by a fair construction, indicate a contrary effect.

ON REHEARING.—

The provisions of the will in question having been re-examined, it is *held* that the residuary estate mentioned in the twenty-third clause is not subject to further charge in making up deficiencies in annuities, and that final settlement of the estate is not to be postponed on account of any such deficiency.

Multnomah county: L. B. STEARNS, Judge.

Plaintiff appeals. Reversed.

This proceeding involves the construction of the will of Levi C. Millard, deceased. Those clauses of the will, the construction of which are involved in this suit, are set

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out in *hæc verba*. After providing for the sale of certain real estate, the testator continues in the second subdivision: "The proceeds of such sale to be applied as follows: One-half I give and bequeath to my nephew, Ralph W. Hoyt, as trustee, to be invested by him in such manner as to him shall seem fit, and the income to be derived therefrom to be paid every three months to my sister, Harriet N. Morse, during her lifetime; and in the event of her death, leaving her husband surviving her, then the income derived from said sum of money to be paid every three months in equal proportions to her daughters, Eugenia Morse, Emma Morse, and Harriet Morse, or to the survivors of them, or either of them; and after the death of both their father and mother, it is my will that said principal sum be divided equally, share and share alike, among said daughters of my sister, Harriet, or the survivor of them, or either of them; and in the event said Eugenia Morse, Emma Morse, and Harriet Morse, or either of them, do not survive both their father and mother, then it is my will that said principal sum be paid by said trustee to the Boys' and Girls' Aid Society of Oregon." After disposing of the other half of the proceeds of said real estate, the will contains this provision: "Third—I give and bequeath to my nephew, Ralph W. Hoyt, as trustee, the sum of ten thousand dollars, which sum is to be invested by him in such manner as to him shall seem fit, and the income derived therefrom to be paid at the end of every three months to my sister, Harriet N. Morse, it being my will that she receive the sum of three hundred and seventy-five dollars per quarter annum therefrom; and in the event the income derived from said sum of ten thousand dollars does not reach the sum of three hundred and seventy-five dollars per quarter annum, then the deficiency is to be paid by my executors out of my residuary estate. After the death of my sister, Harriet N. Morse, in the event of her husband surviving her, then it is my will that the income derived from said ten thousand dollars

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be paid each quarter annum to her daughters, Eugenia Morse, Emma Morse, and Harriet Morse, or to the survivors of them, or either of them in equal proportions, share and share alike; and after the death of both their father and mother, then that said sum of ten thousand dollars be equally divided among the aforesaid daughters of my sister, or the survivors of said daughters or either of them; and in the event the said Eugenia, Emma, and Harriet Morse, or either of them, do not survive both their mother and father, then it is my will that said sum of ten thousand dollars be paid by said trustee to the Boys' and Girls' Aid Society of Oregon."

The twenty-third clause of said will is as follows: "All the rest, residue, and balance of my estate, real, personal, or mixed, after satisfying all the bequests, charges, and legacies hereinbefore made by me, I direct shall be converted by my executors hereinafter named, into money; and the amount realized therefrom by them I give and bequeath in the manner following: I give and bequeath to my nephew, Ralph W. Hoyt, as trustee, forty per centum thereof, to be invested by him in such manner as to him shall seem fit, and the income to be derived therefrom is to be paid every three months to my sister, Harriet N. Morse; and in the event of her death leaving her husband surviving her, then the income of said forty per centum shall be paid every three months to her daughters, Eugenia Morse, Emma Morse, and Harriet Morse, or to the survivors of them, or either of them, in equal proportions, share and share alike; and after the death of both their father and mother, it is my will that said forty per centum of the residue of my estate shall be equally divided, share and share alike, among said daughters of my sister, Harriet N. Morse, or the survivors of said daughters, or either of them; and in the event that the said Eugenia, Emma, and Harriet Morse, or either of them, do not survive their father and mother, then it is my will that said forty per centum of

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my residuary estate be paid by said Ralph W. Hoyt to the Boys' and Girls' Aid Society of Oregon. It is my will that forty per centum of the sum of money realized by my executors out of the rest, residue, and balance of my estate be paid by them to my sister-in-law, Mrs. Jessie N. Millard, and her six children, hereinbefore named, in equal proportions, share and share alike; provided, however, that the portion thereof coming to such of the said children that are minors is to be retained by my executors and invested by them until such minors attain their legal majority, and the principal sum, together with the accumulated interest, shall be paid to each of said children when they arrive at their majority. In the event of any of said children dying before reaching their legal majority, then it is my will that the sum devised to said child so dying shall be paid to their mother, Mrs. Jessie N. Millard. The remaining twenty per centum of the rest, residue, and balance of my estate I give and bequeath to the Boys' and Girls' Aid Society of Oregon."

The second clause of the will, which directs the sale of certain real estate and the conversion thereof into money, gives one-half thereof to the testator's sister-in-law, Mrs. Jessie N. Millard, and her six children, in equal proportions, share and share alike, the part going to said minors to be retained by the executors until said minors should attain their majority, and then to receive the same with the accumulated interest.

By the sixth subdivision of said will, the testator makes substantial and liberal provisions for his sister-in-law, Mrs. Jessie N. Millard, differing mainly in the provision for Mrs. Morse in that Mrs. Millard and her children receive the money bequeathed to them at once, without waiting until the death of any one, and not the interest thereon.

The county court, where this proceeding originated, ordered that the income from the four thousand seven hundred and fifty dollars in the hands of the trustee contribute to make up the said quarterly payment of

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three hundred and seventy-five dollars, payable to the plaintiff; and that this income, together with the income from the ten thousand dollars, should first be resorted to, to make up to the plaintiff the three hundred and seventy-five dollars per quarter, before the residuary estate should be resorted to; and that the deficiency, if any, should be made up from the residue of the estate until the residue of the estate shall be divided; and forty per cent of said residue of said estate shall be paid over to said Ralph W. Hoyt, trustee, for said plaintiff, when all payments by said executors to plaintiff shall cease. Upon appeal to the circuit court, this order of the county court was affirmed, from which this appeal was taken.

Thomas N. Strong, for Harriet N. Morse.

Wm. B. Gilbert, for the Boys' and Girls' Aid Society.

Chas. H. Carey, for Macrum and Hoyt, Executors.

G. G. Gammans, for Mrs. Jessie N. Millard.

STRAHAN, C. J.—The first contention of the plaintiff is, that both the circuit and county courts erred in decreeing that the proceeds or interest accruing from the trust fund of four thousand seven hundred and fifty dollars, placed in the hands of Ralph W. Hoyt, as trustee, should be made to contribute to the three hundred and seventy-five dollars which is payable to Mrs. Morse quarterly. This must be determined by ascertaining the intention of the testator, to be derived from the language of the will itself; and if this cannot be done, then by resorting to the recognized rules of interpretation in such case. The language used is plain and unambiguous; and if there be any uncertainty as to the meaning of the several provisions of the will under consideration, it grows out of the various clauses, as they may be thought to affect each other, and what counsel supposed to be testator's intention.

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The second clause, or subdivision, of the will, directs the sale of certain real property of the testator, and then provides that one-half, which is admitted to be four thousand seven hundred and fifty dollars, should be turned over to Ralph W. Hoyt, as trustee, and the income derived therefrom was to be paid over every three months to the plaintiff during her lifetime. By the same clause of the will, the testator disposes of the income after the death of the plaintiff, and finally of the fund itself. This bequest is complete in itself, and is in no wise dependent on any other portion of the will for its construction or execution; and there is not the slightest reason to think from the language here used that this fund is to contribute to make up any other bequest contained in the will in favor of the plaintiff. But the defendants' contention is otherwise. They insist that the entire sum which the plaintiff was to receive quarterly under the will is only three hundred and seventy-five dollars, and that this amount is to be made up from the income arising, first, from the four thousand seven hundred and fifty dollars, and, second, from the ten thousand dollars set apart by the third subdivision of the will, and that the residuary estate cannot be resorted to until the income from both of these funds is exhausted. But the language used by the testator precludes this construction. The testator by this clause placed ten thousand dollars in the hands of a trustee, and directed that the income to be derived therefrom be paid to his sister, Harriet N. Morse, every three months, and then continues: * * *. "It being my will that she receive the sum of three hundred and seventy-five dollars per quarter therefrom," that is, from the ten thousand dollars; and then it is further provided: * * * "In the event that the income derived from the said sum of ten thousand dollars does not reach the sum of three hundred and seventy-five dollars per quarter, * * * then the deficiency is to be paid by my executors out of my residuary estate."

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This language is too plain to admit of construction. Its import is obvious. "The deficiency is to be paid by my executors out of my residuary estate."

The only remaining question relates to the time of closing up the estate. It is evident from the tenor of the whole will that the testator did not expect an early settlement of the estate by the executors. The conditions of the will render it impossible to close the estate until some of the beneficiaries under the will shall have passed away.

The second subdivision of the will clearly contemplates that both Mr. and Mrs. Morse shall be removed by death before the fund of four thousand seven hundred and fifty dollars can be divided among the three daughters or the survivors, if any of them be dead; or if all of them be dead at that time, then to the Boys' and Girls' Aid Society of Oregon. So also the bequest under the third subdivision of the will contemplates that both Mr. and Mrs. Morse shall be removed by death before the ten thousand dollars therein mentioned can be divided among their daughters, Eugenia, Emma, and Harriet, or to the survivors of them, or either of them, share and share alike; and if neither of the daughters survive both father and mother, then the ten thousand dollars go to the Boys' and Girls' Aid Society of Oregon. These provisions of the will cannot, therefore, be executed until the happening of the events authorizing a division of this part of the estate, or its payment to the Aid Society, on the happening of the contingency which authorizes its payment to them.

It was suggested upon the argument that the twenty-third subdivision contemplated an early settlement of the estate. We do not think it practicable to set apart forty per cent of the residue of the estate to Ralph W. Hoyt, trustee, so long as the plaintiff lives, for the reason that the residue of the estate must contribute to make up the three hundred and seventy-five dollars payable quarterly to Mrs.

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Morse. This payment is to continue during her life, and any deficiency that may arise, or any sum that is not realized from the ten thousand dollars, is a charge upon this residue, as we have already suggested; so that this twenty-third clause of the will, providing for a division of the estate, forty per cent to Hoyt as trustee, the income therefrom to be paid to Mrs. Morse, and after her and her husband's death the principal to be divided among their daughters, or the survivor of either of them, etc., and forty per cent to Mrs. Millard and her children in equal portions, but the children not severally to receive their portions until they respectively attain their majority, cannot be carried into effect until after the death of Mrs. Harriet N. Morse. The residuary estate will be released from the charge by that event, as Mrs. Morse's daughters will then only receive the income from the two sums set apart for them in Hoyt's hands, whatever that may be, subject to any other provision in the will in their favor.

Another cause of delay is the minority of some or all of Mrs. Millard's children. Their portion is to be paid to them severally when they attain their majority, and they cannot receive it before. Until the happening of that event, the executors of the will must have charge of their interests, carefully keeping the moneys of the estate at interest under the direction of the county court.

Something was said by counsel on the argument as to the time from which the will speaks. Though not strictly necessary to the disposition of either question now before us, it may become material in the further execution of the will. The general rule is, that a will speaks from the death of the testator, and not from its date, unless its language, by a fair construction, indicate a contrary intention. (*Canfield v. Bostwick*, 21 Conn. 550; *Gold v. Judson*, Id. 616.)

Let the decree appealed from be reversed, and a decree entered here in accordance with this opinion.

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[Filed June 9, 1892.]

ON REHEARING.

STRAHAN, C. J.—A petition for a rehearing has been filed herein; and upon further consideration of the matter, I am satisfied the former opinion must be modified so far as it undertook to construe the twenty-third subdivision of the will, and in postponing the distribution. The twenty-third subdivision provides: "All the rest, residue and balance of my estate, real, personal or mixed, after satisfying all the bequests, charges and legacies hereinbefore made by me, I direct shall be converted by my executors hereinafter named into money; and the amount realized therefrom by them I give and bequeath in the manner following: I give and bequeath to my nephew Ralph W. Hoyt, as trustee, forty per centum thereof to be invested by him in such manner as to him shall seem fit; and the income to be derived therefrom is to be paid every three months to my sister, Harriet N. Morse; and in the event of her death, leaving her husband surviving her, then the income of said forty per centum shall be paid every three months to her daughters, Eugenia Morse, Emma Morse, and Harriet Morse, or to the survivor of them, or either of them, in equal proportions, share and share alike; and after the death of both their father and mother, it is my will that said forty per centum of the residue of my estate shall be equally divided share and share alike among said daughters of my sister, Harriet N. Morse, or the survivors of said daughters, or either of them; and in the event that the said Eugenia, Emma, and Harriet Morse, or either of them, do not survive both their father and mother, then it is my will that said forty per centum of my residuary estate be paid by said Ralph W. Hoyt to the Boys' and Girls' Aid Society of Oregon. It is also my will that forty per centum of the sum of money realized by my executors out of the rest, residue and balance of my estate, be paid by them to my

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sister-in-law, Mrs. Jessie N. Millard, and her six children, hereinbefore named, in equal proportions, share and share alike; provided, however, that the portion thereof coming to such of the said children that are minors is to be retained by my executors and invested by them until said minors attain their legal majority; and the principal sum, together with the accumulated interest, shall be paid to each of said minors when they arrive at their majority. In the event of any of said children dying before reaching their legal majority, then it is my will that the sum devised to said children so dying shall be paid to their mother, Mrs. Jessie N. Millard. The remaining twenty per centum of the rest, residue and balance of my estate I give and bequeath to the Boys' and Girls' Aid Society of Oregon."

The residue of the estate mentioned in this clause of the will must be distributed according to its provisions, as soon as realized, and will not be further subject to the charge in favor of Mrs. Morse for the purpose of making up to her the three hundred and seventy-five dollars payable to her quarterly. Under this construction of the will, the settlement of the estate is not necessarily postponed, but the same may be closed as soon as the residuary estate shall be reduced to money and ready for payment to the legatees and distributees under the will, and all other terms of the will are complied with; and the former opinion will be modified accordingly, and also so as to conform to the construction of the twenty-third subdivision, as above suggested; and with these modifications the petition for a rehearing will be denied.

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[Filed April 11, 1892.]

ADELIA STITT v. D. E. BUSH.

REAL PROPERTY—DESCENTS—HEIRS.—An intestate died seized of real property, and left surviving her her husband and four minor children. Of these children, two minor sons afterwards died childless and unmarried; *held*, that the real property inherited by them from their mother descended to their father, to the exclusion of the other children.

Washington county: **FRANK J. TAYLOR**, Judge.

Defendant appeals. Reversed.

Geo. H. Williams, for Appellant.

Thos. H. Tongue, for Respondent.

BEAN, J.—This is a suit for partition of real property. The facts are, that in May, 1879, Maria E. Bush, the wife of the appellant, died intestate, seized and possessed of the real property in controversy, leaving as survivors, her husband and four minor children. Two of these children, both males, subsequently died under age and unmarried. The question for decision is, whether upon the death of these two children, their interest in their mother's estate descended to the father, or to their brother and sister. The solution of this question depends upon the construction to be given to the statute of descent in force at the time of Mrs. Bush's death (Hill's Code, § 3098,) and its applicability to the case in hand. By subdivision 2 of this section, it is provided that if any person shall die seized of any real property, not having lawfully devised the same, if he leave no issue nor wife, such real property shall descend to his father. This provision precisely embraces the case of the two minor children of Mrs. Bush, and furnishes the rule governing the descent of their estate, unless it is qualified and controlled by subdivision 6 of the same section, which is as follows: "6. If the intestate shall leave one or more children, and the issue of one or more deceased children, and any of such surviving children shall die under age,

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without having been married, all such real property that came to such deceased child by inheritance from such intestate shall descend in equal shares to the other children of such intestate, and to the issue of any other children of such intestate who shall have died, by right of representation; but if all the other children of such intestate shall be also dead, and any of them shall have left issue, such real property so inherited by such deceased child shall descend to all the issue of such other children of the intestate in equal shares, if they are in the same degree of kindred to such deceased child; otherwise they shall take by right of representation ”

The contention for plaintiff is, that this subdivision qualifies and controls and, in effect, modifies the previous provisions of the section, so that if any person die intestate, seized of real estate, leaving two or more children, and any of such surviving children die under age and unmarried, all such real property that came to such deceased child by inheritance from such intestate, shall descend in equal parts to the remaining children, the same as if such child had died in the lifetime of the intestate, and therefore, on the death of the two minor children of Mrs. Bush, their interest in their mother's estate descended to the remaining children, and not to the father, as would have been the case if subdivision 3 is to control. This contention is based upon the assumption that subdivision 6 provides for a case of a parent dying leaving several children; but by its language it only applies in cases where the intestate has left one or more children and also the issue of one or more deceased children. By the terms of this statute, to make it applicable, it is not enough that the intestate shall leave one or more children; but it is necessary that he shall leave one or more children and the issue of one or more deceased children; and these facts must exist in conjunction before this subdivision becomes applicable. This is the obvious import of the language of the statute, and it cannot be

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made applicable to the case at bar without rejecting as surplusage all reference to the issue of deceased children, and this we cannot do. We have been unable to find a similar statute in any of the other States, and we do not think any such exists.

The statute of descent in Massachusetts prior to 1876, and several of the other States, modeled after the English statute of distributions, 22 and 23 Car. II, c. 10, provide that if any person dies leaving several children, or leaving one or more children and the issue of one or more deceased children, and any of such children shall die under age and unmarried, all the estate that came to such deceased child by inheritance from such deceased parent, shall descend to the other children in equal parts, and to the issue of any such other children who have died, by right of representation.

Under these statutes it has been held that where a man dies leaving several children, and one of them dies under age and unmarried, the surviving children of the father will take the share of the deceased child to the exclusion of the other heirs. (*Runey v. Edmonds*, 15 Mass. 291; *Nash v. Cutler*, 16 Pick. 491; *De Castro v. Barry*, 18 Cal. 96; *Orowell v. Clough*, 23 N. H. 207; *Burke v. Burke*, 34 Mich. 451.)

But it will be observed that these statutes become applicable upon the happening of either of two conditions—first, when the intestate shall leave several children, and, second, when he shall leave one or more children and the issue of a deceased child or children. The first of these conditions has been omitted from our statute, leaving only the second, and, therefore, the cases above cited have no application here. Why a portion only of this statute should have been adopted by the legislature of this state, and what reason can be suggested why the statute should be made applicable to the case of a person dying leaving one or more children and the issue of a deceased child, and not to the case of a person dying leaving children only, is not apparent; but that such is the language of the

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statute seems clear, and the courts cannot supply the omission. (*State v. Simon*, 20 Or. 365.)

The facts of this case not coming within the provisions of subdivision 6, we conclude that upon the death of the two minor children of Mrs. Bush, their interest in the property in controversy descended to their father, and not to their brother and sister, and the decree of the court below must be reversed.

[Filed April 11, 1892.]

J. W. RAYBURN v. R. M. DAVISSON ET AL.

POSSESSION OF LAND—NOTICE TO SUBSEQUENT PURCHASERS.—A person taking a conveyance of, or incumbrance upon, land when another is in the actual and visible possession thereof, will be affected with notice of everything in relation to the title which could be known on diligent inquiry; and where a party has notice of such facts as should put a prudent man on inquiry, a failure to make such inquiry is visited with all the consequences of actual notice. *Wood v. Rayburn*, 18 Or. 1, followed and approved.

PRINCIPAL AND AGENT—NOTICE TO AGENT.—If information received by an agent, acting within the scope of his authority, be of a character which makes it his duty to communicate the same to his principal, the latter is bound by the notice arising from the information, although it was not received by the agent in the identical transaction to which the notice relates.

PRACTICE ON APPEAL—DEFECTIVE DENIALS—WAIVER OF OBJECTION.—Where the evidence has all been taken, and the case has, without objection, been heard to a final decree on an issue that is defective by reason of argumentative denials in the answer, neither party will be heard to complain of the error for the first time in the supreme court.

Benton county: M. L. PIPES, Judge.

Plaintiff appeals. Affirmed.

J. W. Rayburn, for Appellant.

John Burnett, John Kelsay, and W. S. McFadden, for Respondents.

LORD, J.—This is a suit to foreclose a mortgage on certain real property described in the record. The complaint

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43	886

22	242
44	278

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is in the usual form. The mortgagors made default. The defendants Davisson and Hartless, after denying the facts alleged, set up two separate defenses. The agreed facts are in substance, that on the sixth day of November, 1886, the defendant S. Rayburn and wife made, executed, and delivered to E. L. Rayburn the note and mortgage on the real property mentioned in the complaint in this suit; that the same was duly recorded, and that in April, 1887, the said E. L. Rayburn sold and assigned the said note and mortgage to this plaintiff; that in the year 1888, one Alexander Wood brought a suit in the circuit court of said county against S. Rayburn for the purpose of making a charge or lien upon said real property herein mentioned of the sum of five hundred and ninety-one dollars, and that in 1889 a decree was rendered therein to that effect, and that the said property be sold to satisfy the same; that subsequently the said real property was sold by the sheriff by virtue of an execution issued upon said decree, and at such sale the defendants Davisson and Hartless became the purchasers; that the said sale was duly confirmed and a deed made by the sheriff, which has been duly recorded. It is stipulated by the parties that the evidence in the case of *Wood v. Rayburn*, 18 Or. 1, shall be taken as evidence in this suit. In *Wood v. Rayburn*, *supra*, it was held that the defendant had such notice of the rights and equities of the plaintiff as to put a prudent man on inquiry, and as a consequence he was charged with all the consequences of actual notice. As the evidence to be applied in this case is the same as was applied in that case, our first inquiry is, whether the plaintiff is affected with notice of the equities of Wood. The facts show that Wood was in possession of the land under a contract with Mary E. Huffman in July, 1881, and that some years thereafter, while he was still in possession under a deed, which, for want of proper acknowledgment, was defective, she made a conveyance of the same land to E. L. Rayburn, the brother of the plaintiff, who

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conducted the whole transaction for him, and the transfer of the same property to S. Rayburn, his father, who gave the note and mortgage in this suit to E. L. Rayburn, which was subsequently transferred to the plaintiff, and upon which this suit for foreclosure was brought.

It is not possible to read the evidence of the transactions by the Rayburns which took place in reference to this property while Wood was in possession without being strongly impressed with the conviction that the plaintiff had actual notice of the equities of Wood. His dealings with Mrs. Huffman in respect to this property lead strongly to this conclusion. As he dealt with her at the time the deed was executed to his brother, and was the principal actor in the matter, his conversation with her in respect to the taking of the deed, and all the circumstances surrounding the transaction, indicate that he must have had some information or knowledge of Wood's equities in the land. He knew when he took this mortgage from his brother that the mortgagor, his father, had never been seized nor in possession of the land until 1886, and the evidence of Felger is to the effect that he obtained possession then by force; but the evidence does show that Wood was in possession of the land from July, 1881, until S. Rayburn, the father, obtained possession of it as indicated. Mrs. Huffman was not in possession when she made the deed to E. L. Rayburn, and Wood was in possession, open and notorious, at that time, and for several years preceding. This mortgage was taken on the land with notice of all these facts.

It is not necessary to specify the circumstances in detail. The proposition is elementary that possession of land constitutes one kind of notice. Open and exclusive possession is sufficient to put a purchaser upon inquiry. (*Fair v. Stevenot*, 29 Cal. 486; *Pell v. McElroy*, 36 Cal. 268.) "The rule is," said DOWNER, J., "that possession to be notice must be open, visible, exclusive, and unambiguous, not

liable to be misunderstood or misconstrued." (*Ely v. Wilcox*, 20 Wis. 523.)

In *Moyer v. Hinman*, 13 N. Y. 180, the plaintiff was in actual possession of farming lands, under a contract of purchase; and that circumstance was held notice to all persons who had subsequently become interested in the premises, of all the plaintiff's rights under his contract. In *Bank v. Flag*, 3 Barb. Ch. 316, it was held that the actual possession of the premises by the tenant of a purchaser, was constructive notice to subsequent mortgagees of the equitable rights of such purchaser. There must be actual possession, manifested by such acts of ownership as would be observed by others. (16 Am. & Eng. Ency. Law, 802.) A person taking a conveyance of land when another is in the actual and visible possession thereof, will be affected with notice of everything in relation to the title which could be known on diligent inquiry. Where a party has notice of such facts as should put a prudent man on inquiry, a failure to make such inquiry is visited with all the consequences of actual notice. (*Wood v. Rayburn*, 18 Or. 1.)

The possession of Wood was of that open and visible character, and manifested by such acts of ownership, as would have been observed and known. Where such is the case, notice will be imputed,—there is no other reasonable inference from the facts. The reason is, that when such facts come to the knowledge of the purchaser, or subsequent incumbrancer, the law requires him to pursue it until it leads to notice. "Whatever," said STERRETT, J., "puts a party on inquiry amounts to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, where the inquiry, if pursued, would lead to knowledge." (*Parke v. Neeley*, 90 Pa. St. 59.) The plaintiff here was agent for the defendant in the transaction which culminated in the suit of *Wood v. Rayburn*, *supra*. His conduct in that negotiation and transaction indicated that

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he thought and believed the deed of Mrs. Huffman to Wood was void. He knew that Mrs. Huffman was not in possession when the deed to his brother, E. L. Rayburn, was made, and that Wood was in possession of the land. The fact of Wood's open and exclusive possession from July, 1881, confronted him. As the agent of his brother in that transaction, he had notice of all these matters. It is a general rule that notice to an agent is notice to the principal. "Whenever the agent," says Mr. Wharton, "acting within the scope of his duties for his principal, receives notice in a matter in which he represents the principal, such notice is notice to the principal, although the notice is not received in the identical transaction to which the notice relates. The test is, whether the information was of a character which it was the duty of the agent to communicate. If so, it binds the principal." (Wharton's Agency, § 178.) And in consonance with this principle, the matters of which J. W. Rayburn, the plaintiff here, as agent, had notice, was held to bind the defendant in *Wood v. Rayburn*, 18 Or. 1. When the plaintiff in this case subsequently took his mortgage by assignment from E. L. Rayburn, who had sold the land to his father, the defendant in *Wood v. Rayburn*, and took from him the mortgage so assigned, it was with a knowledge of all these facts,—of Wood's open and exclusive possession under his contract,—and we must conclude that the plaintiff and his assignor had notice of the same when such mortgage was taken and when it was assigned. In a word, we are satisfied from the evidence that the plaintiff was chargeable with notice of Wood's equities when he took the assignment of the mortgage. Nor has he ever denied such notice. His mortgage must, therefore, be considered the junior incumbrance, subject to the lien of Wood on the land in question for his purchase money. The result is, that the sale of the land to Davisson and Hartless transferred to them the lien of Wood, and as his successors they have a lien prior to the plaintiff.

Points decided.

On the argument, it was suggested that the answer failed to deny the allegation in the complaint that the defendants' interest was subsequent and subject to plaintiff's mortgage. That allegation is not, in so many words, denied by the answer, but it is denied argumentatively by alleging Wood's purchase of the land of the Huffmans, on the ninth of July, 1881. This antedates the mortgage, and is denied by the reply. Such a method of forming issues is irregular, and not to be encouraged; but when the evidence has all been taken, and the case has proceeded to trial without objection on an issue that is defectively stated, we do not think that either party should be permitted to raise the objection in this court for the first time.

The case is here upon its facts, and as such we have examined and decided it. Owing to some matters in the brief and the evidence set out in *Wood v. Rayburn*, 18 Or. 1, stipulated to be used in this case, we take occasion to say that it does not appear to us from the evidence that the deed of Mary E. Huffman to E. L. Rayburn was changed or altered by J. W. Rayburn after she signed it. On the contrary, the preponderance of the evidence is the other way, and this statement is made to avoid any inference of that kind; but in the view we have taken of this case, the consideration of this question becomes unnecessary.

The decree of the court below must be affirmed.

[Filed April 11, 1892.]

R. M. DAVISSON ET AL. v. WM. MACKAY ET AL.

EQUITABLE LIEN—PRIOR EQUITY—DORMANT JUDGMENT.—A party in possession of land under a defective deed, and having an equitable lien thereon for the purchase price paid by him, being otherwise without notice, is not affected by a subsequent suit to subject the land to the payment of a judgment against one who is alleged to have advanced the money for the conveyance to the grantor in the defective deed, but who by the record is a stranger to the title, especially where the judgment was dormant when the possession began under the defective deed.

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Benton county: M. L. PIPES, Judge.

Defendants appeal. Affirmed.

J. W. Rayburn, for Appellants.

John Burnett, *John Kelsay*, and *W. S. McFadden*, for Respondents.

LORD, J.—This is a suit for an injunction to enjoin the sale of certain real property described in the complaint upon an execution issued in favor of B. F. Dunn and against one W. H. Huffman. The facts show that one Kenoyer in the year 1876, as owner, conveyed the land in question to Mary E. Huffman, and that the said Mary sold the same to Alex. Wood, who went into possession in July, 1881; but that the deed being defective failed to convey the title to him; that in 1876 the said Mary conveyed to E. L. Rayburn the legal title of the land in dispute; that he sold the same to his father, S. Rayburn, and that in 1888 the aforesaid Wood commenced a suit against Rayburn, whereby he procured a decree declaring the purchase price paid by him to Mary E. Huffman a lien on said land, and directing that the same be sold to satisfy the lien; that in August, 1889, the land was sold at sheriff's sale under a decree, and the plaintiffs became purchasers, and went into possession under their certificate from the sheriff, and that since then they have received a deed from him. It also appears that the defendant Dunn secured a judgment in 1877 against W. H. Huffman, and that the execution in this case, which is sought to be enjoined, was issued upon said judgment by leave of the court. This judgment was docketed in 1877 and again in 1889. It further appears that in October, 1881, the defendant Dunn brought suit against W. H. Huffman and Mary E. Huffman to subject the land in question to the payment of his judgment of 1877 against W. H. Huffman, alleging that the said Huffman had paid the whole price therefor, and that the grantor Kenoyer had

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made the deed to Mary at the instance of her husband, who intended thereby to defraud Dunn of his demand. This suit was pending several years, but it seems that a decree was entered in 1886 declaring the deed void, and that the judgment of 1877 be satisfied out of the land. There is some dispute regarding the regularity of this decree, and it is not clear from it how the land, when the deed was declared void without putting the title in Huffman, could be subjected to the lien of the judgment. But it is not material to consider this aspect of the question, as it is the execution issued upon the judgment of 1877, which after becoming dormant was revived in 1889, that is sought to be stayed.

As the evidence in *Wood v. Rayburn*, 18 Or. 1, is stipulated to apply to this case, it is important to notice that it was held in that case that the defendant Rayburn had notice of the rights of the plaintiff, because (1) Mrs. Huffman was not in possession of the property at the time of its conveyance to the defendant Rayburn, and (2) because the plaintiff Wood was in possession at the time of the transfer, which was notice to the defendant Rayburn of his equities. The land then in dispute is the land involved in this suit. So that it may be said of that case, that it was the want of possession of the party conveying, and the actual possession of Wood at the time of such conveyance, that constituted notice of his equities. The facts show that Wood was in possession of the property in July, 1881, and that the suit of Dunn to set aside the deed was commenced subsequently, in October, 1881. As the record stood, Wood had no notice of the lien of the judgment as against the property in question, and of which he was in possession. Nor when the suit was brought and the lien declared against the property did Dunn have any lien against it; until so declared or when declared, if it related back to the date of the judgment, it did not affect any intervening rights which had been acquired without notice of it. There

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was nothing to put Wood on inquiry or to affect him with notice of any equitable rights that Dunn had at the time he went into possession of the property under his defective deed. So that when Dunn commenced his suit and several years thereafter procured a decree that the property should be sold for the payment of his lien, such sale must necessarily have been made subject to Wood's equities. Whatever rights or equities, therefore, that the defendant Dunn established by his suit, was with notice of the equities of Wood and subject to them.

As the plaintiffs have succeeded to all the legal and equitable rights of Wood, it results that their equities are superior to any equities that the defendant Dunn acquired by his suit. Nor is this all. When Wood commenced his suit against Rayburn to enforce his lien against the land in question on account of his purchase from Mary E. Huffman, as decreed in *Wood v. Rayburn, supra*, the defendant Dunn's judgment against Huffman had been dormant several months and was no lien on anything. So that in whatever way we may regard the facts of this case, we are unable to discover any error.

The decree must be affirmed.

[Filed April 11, 1892.]**CHARLES H. DODD v. WM. ST. JOHN ET UX.**

HUSBAND AND WIFE—EXPENSES OF FAMILY—LIABILITY OF WIFE—Under section 2874, Hill's Code, which provides that "the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately," a wife is liable for the purchase price of a buggy bought for and used in the family as a family vehicle.

Linn county: R. P. BOISE, Judge.

Plaintiff appeals. Reversed.

The substance of the amended complaint alleges: "That the plaintiff, on the first day of October, 1888, was, ever

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since has been, and now is, doing business in the state of Oregon, with headquarters at Portland, Oregon, under the firm name and style of Charles H. Dodd & Co., and that the sole and only member interested in and composing the said firm known as Charles H. Dodd & Co. is now and at all times since January 1, 1880, has been Charles H. Dodd only; that on the eleventh day of October, 1888, and for a long time prior thereto, the said defendants were, ever since have been, and now are, husband and wife; that in the state of Oregon, on the eleventh day of October, 1888, the plaintiff, at the special instance and request of the defendant Wm. St. John, sold and delivered to him, the said defendant Wm. St. John, for the use of himself and his wife, Cynthia A. St. John, and their minor children, and for the especial use, enjoyment and benefit of, and as a necessary for the family of said defendant, one certain buggy, a family vehicle, at and for the agreed price of one hundred and two dollars and fifty cents, and that said defendant Wm. St. John purchased said buggy for the sole use of, and as a family expense, and as a necessary for his family, consisting of himself, his wife, the said defendant Cynthia St. John, and their minor children; that the said buggy was and is a necessary and family expense, incurred by said defendant Wm. St. John, for the use and benefit of his said family, as aforesaid, and that said defendant Cynthia St. John is liable for the said sum of one hundred and two dollars and fifty cents and the whole thereof; that the said buggy, the said family vehicle, was used, and has been used and enjoyed, and is now in the use and enjoyment of the said defendants Wm. St. John and Cynthia St. John and their minor children, and has been so used by them ever since the sale and delivery thereof to defendant Wm. St. John, as aforesaid; that Wm. St. John and Cynthia St. John are members of the United Presbyterian Church, at Oakville, Linn county, Oregon, and are regular attendants at the religious services of said church, and that said buggy was purchased

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especially for the use and conveyance of said defendants and their family to and from their residence to said church, and is and was a family expense, and necessary to the rank, profession and station in life of said defendants and their family; that no part of said sum of one hundred and two dollars and fifty cents nor of the interest thereon has been paid, and that there is now due and owing for said buggy, as aforesaid, from the said defendants to this plaintiff, the sum of one hundred and two dollars and fifty cents, with interest thereon at the rate of eight per cent per annum from October 11, 1888, until paid."

The court below sustained a motion to strike out portions of this complaint, and then sustained a demurrer to the residue, and entered a final judgment in favor of the defendants, from which this appeal was taken.

Geo. W. Wright, and D. R. N. Blackburn, for Appellant.

W. R. Bilyeu, for Respondents.

STRAHAN, C. J.—This action is founded on section 2874, Hill's Code, which is as follows: "The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." This statute is a wide departure from the common law and from the legislation of most of the states. Whether its enactment was wise and its provisions beneficent in their operation, is not for the court to determine; that in some instances at least, it works a great hardship on the wife in subjecting her to a liability which she did not contract for expenses of the family, cannot be doubted. But the power of the court in the premises is confined to its construction and enforcement in cases as they shall arise.

The first case in this court under this statute was *Watkins v. Mason*, 11 Or. 72. It was for a butcher's bill, and the wife was held liable. In that case, there was nothing to charge the wife, except that she was the wife of O. P. Mason,

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and the meats were used in their household. After referring to some Iowa cases, the court remarks: "If by the law of these cases, the meat sold by the appellant to O. P. Mason for family use was used in the family, then Mary Mason, the wife, is liable."

Phipps v. Kelly, 12 Or. 213, was the next case in this court under that statute. It was a suit in equity to charge the property of the wife; and after holding that under this statute a plaintiff might sue either at law or in equity, the court, per LORD, J., said: "Family expenses may include necessities and more. In *Smedley v. Felt*, 41 Iowa, 590, the court, in commenting on a statute identical with this, said: 'The language of the statute is general. It applies to the expenses of the family without limitation or qualification as to the kind or amount. * * * What is necessary depends very much upon the wealth, habits, and social position of the party; what is a family expense, depends upon none of these considerations. * * * The only criterion which the statute furnishes is, was the expenditure a family expense,—was it incurred for, on account of, and to be used in the family?'"

The question was again before this court in *Black v. Sippy*, 15 Or. 574, where it was held among other things, that the wife is liable for goods for family use, although sold to the husband on his individual credit. In *Holmes v. Page*, 19 Or. 232, the question was again presented, and the court held that where goods are bought as family expenses, and are so used, either husband or wife is liable in an action for them; and the subject was again referred to in *Davis v. Davis*, 20 Or. 85, in which case it was remarked that "whatever family expenses were incurred while either of the parties owned this property, were a charge upon it." That was a case where Mrs. Davis held the legal title, and while the title was in her she paid certain family expenses; and it was thought equitable that this money should be returned to her before a general creditor

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of her husband could be allowed to subject this property to the payment of the husband's debt, on the ground that the conveyance to the wife was fraudulent.

The real contention in this case is, whether or not the buggy mentioned in the complaint is a family expense within the meaning of this statute—not whether it is a necessary family expense. The word necessary does not occur in the statute, which relieves the case of the question whether the expense was a necessary one or not. The statute is broad enough to subject the wife to liability for articles that are purchased and used in the family, whether they were necessary or not. In fact, the articles may have been entirely unnecessary, or such as the family ought to have dispensed with, or they may have been of no utility; still, if they were purchased and used in the family, we do not see on what ground the liability of the wife could be avoided.

In *Fitzgerald v. McCarty*, 55 Iowa, 702, the court was called upon to state the rule by which the jury was to determine what were family expenses within the statute, and it was held that it was essential to constitute a family expense that the thing for which the expenditure was incurred should have been kept for use in the family. It is the expenses of the family which, under the statute, are chargeable on the property of both husband and wife. This implies, we think, that the expense must have been incurred for something used in the family, or kept for use, or been beneficial thereto. The same statute is in force in Illinois; and in *Von Platin v. Krueger*, 11 Brad. 627, it received the same construction; and it was further held that what would be included in the term family expenses must be determined by the circumstances of each case. In *Smedley v. Felt*, 43 Iowa, 607, a debt was incurred for a piano, and the wife was held liable under this statute.

It was held in *McCormick v. Muth*, 49 Iowa, 536, that a reaping machine did not constitute a family expense within

the statute, and was not chargeable on the wife's separate property. Nor do family expenses include money borrowed to purchase or pay for articles which in themselves were in fact proper items of family expense (*Davis v. Ritchey*, 55 Iowa, 719); nor is a breaking-plow a family expense (*Russell v. Long*, 52 Iowa, 250); nor is money advanced to the husband and used by him for the payment of family expenses. (*Sherman v. King*, 51 Iowa, 182.)

On the other hand, in *Schrader v. Hoover*, 80 Iowa, 243, a physician's bill was held to be a family expense within the statute; and to enable the doctor to recover against the wife, it was not necessary for him to allege and prove that such services were needful and proper for her. So in *Frost v. Parker*, 65 Iowa, 178, an organ though purchased by the husband for re-sale, although never actually sold by him, but used in the family for about seven years as organs are ordinarily used, was held to be a family expense. So was the rent of a house occupied by the family as a residence. (*Illingsworth v. Burley*, 33 Ill. App. 394.) So also a lady's gold watch and chain, a ring and other small articles of jewelry purchased by the husband and used by members of his family, were held to be articles of family expenses within the statute. (*Marquardt v. Flaughner*, 60 Iowa, 148.) And so was a sewing machine a family expense. (*Farrar v. Emery*, 52 Iowa, 725.) What are expenses of the family must be determined according to the facts of each particular case as it shall be presented. In many cases the question must be determined by the use made of the article purchased. If the article were purchased and brought into the family and used there, it is a family expense. Enough is alleged in the complaint to show that the buggy was so used, and the court erred in sustaining the demurrer. When the facts are developed before a jury with proper instructions from the court, the jury can readily determine the question.

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The judgment must, therefore, be reversed, and the cause remanded for such further proceedings as may be according to law and the practice of the circuit court.

[Filed April 18, 1892.]

MARIA A. RAWSON v. CHARLES J. STEWART.

JUDGMENTS—JOINT PARTIES—INDIVIDUAL LIABILITY.—As between several parties to a judgment, not adversary to each other in the original action, the question of the liability of any of them is always open to subsequent inquiry by appropriate litigation.

RELEASE—PLEADING—EVIDENCE—VERDICT.—A release, like every other contract, must be supported by a consideration; but where the release and the consideration are sufficiently pleaded, and there is some evidence tending to support the allegation, the verdict of a jury thereon will not be disturbed on appeal.

APPEALS—CHARGE FAVORABLE TO APPELLANT.—A party cannot complain on appeal of an instruction to the jury more favorable to himself than it should have been.

Linn county: R. P. BOISE, Judge.

Plaintiff appeals. Affirmed.

The plaintiff's cause of action grows out of the following facts: That early in the year 1883, one E. E. Luce and the defendant Charles J. Stewart were partners in the business of banking, under the name of the Bank of Breckinridge, at the town of Breckinridge, state of Minnesota; that they were desirous of securing the public funds of Wilkin county in said state to be deposited in their bank; and for that purpose they, as principals, with Peter Schroeder, L. F. Yeaton, William Rawson, E. M. Cooper, and C. H. Peak, as sureties, executed and delivered to A. W. Coates, county treasurer of said Wilkin county, or his successors in office, a bond in the penal sum of ten thousand dollars, with these conditions: "The condition of the above obligation is such that, whereas the treasurer of Wilkin county, state of Minnesota, has designated the Bank of Breckinridge, Minnesota, as a depository for the funds of said county; and whereas

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the aforesaid E. E. Luce and C. J. Stewart are the proprietors of the said Bank of Breckinridge; now, therefore, if the said E. E. Luce and C. J. Stewart shall well and truly pay unto said treasurer or his order all money coming into their hands as depositaries of said county, then this obligation to be void, otherwise of full force and effect."

The complaint alleges, that between the twenty-sixth day of January, 1883, and the tenth day of May, 1883, and while said Luce & Stewart were doing business as aforesaid, and while their said bank was the depository for the county funds of said county of Wilkin, the said treasurer deposited in said bank the aggregate sum of six thousand four hundred and twenty-nine dollars and seventy-nine cents, which money came into their hands as depositaries of said Wilkin county. Demand for said sum is alleged to have been made, and that only one thousand four hundred and forty-nine dollars and thirty-three cents was paid to said treasurer; that said treasurer thereafter, on the ninth of June, 1883, duly commenced an action in the district court for the county of Hennepin, in said state, against all the parties to said bond, to recover the balance of four thousand nine hundred and eighty dollars and forty-six cents; that thereafter such proceedings were had in said action that on the thirty-first day of March, 1885, a judgment was rendered in said action in favor of said Albert W. Coates and against the defendants for the sum of five thousand five hundred and seventy-eight dollars and ninety-one cents as damages, one hundred and ninety-seven dollars and seventy-three cents costs, amounting to five thousand seven hundred and seventy-six dollars and sixty-four cents; that on the thirtieth day of April, 1885, said E. M. Cooper paid on said judgment the sum of five hundred dollars. It is further alleged that at the time the demand was made upon him for said money, Luce was insolvent, and so continued up to the time of his death, and that no part of said five hundred dollars has ever been paid to said Cooper, who died on the twenty-sixth

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day of February, 1885, testate, devising and bequeathing all his property, both real and personal, to plaintiff Maria A. Rawson; that said will was duly proven and admitted to probate in Wadena county, Minnesota, and said estate duly awarded to plaintiff by the county court, including the said claim of five hundred dollars paid as aforesaid by said Cooper.

The answer admits that the defendant and Luce did business as partners under the name of the Bank of Breckinridge; denies that any other or greater sum was deposited with Luce and defendant than one thousand six hundred and sixty-one dollars and thirty-three cents, or that they failed to pay the same or any part thereof, except two hundred and twelve dollars; and denies all the other allegations of the complaint except the recovery of the judgment on the bond. For a further defense the answer alleges in substance, that the defendant and Luce dissolved partnership about the twenty-eighth of February, 1883, and that said A. W. Coates, said county treasurer, was immediately notified of said dissolution; that although judgment was had and obtained against this defendant and the said E. E. Luce, as principals, and the said L. F. Yeaton, C. H. Peak, William Rawson, Peter Schroeder, and E. M. Cooper, as sureties upon said bond, as alleged and shown in plaintiff's complaint, the truth is, that all said funds upon which such judgment was obtained were deposited with said E. E. Luce except the sum of two hundred and twelve dollars, after the dissolution of said co-partnership, as aforesaid, and that by reason thereof this defendant was always treated and considered by said sureties and the said E. E. Luce as surety only on said bond; that about the date of said judgment, said Luce transferred, conveyed, and set over to the said Peak and Schroeder a large amount of real and personal property, the exact value and amount thereof this defendant is now unable to state, to secure said Peak and Schroeder as well as the said Yeaton, Rawson,

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Cooper, and this defendant, against the payment of said bond and the judgment obtained thereon as such sureties, and to reimburse them for any amount they or either of them, including this defendant, might have been required to pay on said judgment as such sureties or otherwise; and that about the same date, the said Luce transferred, conveyed, and set over to said Peak, certain other real and personal property in trust for the use and benefit of said Peak and Schroeder as well as for the use and benefit of the said Yeaton, Rawson, Cooper, and this defendant, to secure them and each of them against the payment of said bond and judgment obtained thereon as such sureties, and to reimburse said sureties and this defendant for any amount they or either of them might have been required to pay upon said judgment, the value and amount of which said property this defendant is now unable to state; that Rawson, one of said sureties, was insolvent, and never paid anything on said judgment; that Cooper paid five hundred dollars; but that subsequent to the payment of said five hundred dollars by said Cooper, to wit, about the twenty-third day of September, 1885, in consideration of the real and personal property that had been transferred, conveyed, and set over by the said Luce to said Peak and Schroeder to secure said sureties, including this defendant, against any liability upon said bond and judgment obtained thereon, and in consideration of said real and personal property that had been transferred, conveyed, and set over by the said Luce to Peak, for the use and benefit of said sureties, including this defendant, to secure them and each of them against any liability upon said bond and the said judgment obtained thereon, and for the further consideration that this defendant would, for himself and the said Yeaton, pay upon said judgment the sum of one thousand dollars, and this defendant and Yeaton would release, relinquish, and give up unto the said Cooper, Peak, and Schroeder, all their right, title and interest in and to said real and per-

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sonal property, so conveyed as security and in trust, as aforesaid, they, the said Cooper, Peak, and Schroeder, undertook and agreed to release this defendant and Yeaton from any further liability to them or either of them upon said bond or judgment and every part thereof, and also to release this defendant and Yeaton from or on account of any liability to them or either of them, for any amount that they, or either of them, had prior to the twenty-third day of September, 1885, paid upon said judgment as such sureties or otherwise; that in pursuance of said agreement, the defendant and Yeaton did, on the said twenty-third day of September, 1885, release, relinquish, and give up at the request of the said Cooper, unto the said Peak and Schroeder, all their right title and interest in and to said real and personal property conveyed as security and in trust as aforesaid to the said Peak and Schroeder by the said Luce, and that at the same time this defendant for himself and the said Yeaton paid upon said judgment one thousand dollars, and the said Peak, Schroeder, and Cooper then and there released this defendant as well as the said Yeaton from all claims and demands of whatsoever name and nature they or either of them had or held against this defendant as well as the said Yeaton, by reason of this the said Peak, Schroeder, and Cooper, or either of them, having paid any part of said judgment, or by reason of their said liability upon said judgment; and the said Cooper then and thereby released this defendant from any and all liability to him by reason of the said Cooper having paid the said sum of five hundred dollars on said judgment, and that said Cooper was fully and entirely reimbursed out of the said property conveyed as security and in trust as aforesaid, for the payment of the said five hundred dollars on said judgment.

The reply denied the new matter in the answer. There was a verdict for the defendant; and judgment being ren-

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dered thereon in his favor, the plaintiff appeals. The other facts appear in the opinion.

Woodward & Woodward, for Appellant.

Charles E. Wolverton, for Respondent.

STRAHAN, C. J.—The only questions presented by this appeal relate to the rulings of the court at the trial in the admission of evidence, and the instructions given to the jury. The court below permitted evidence to go to the jury tending to prove that the sureties on the bond, for a valuable consideration, entered into an agreement with the defendant that he should be regarded as a surety with them on said undertaking after his withdrawal from the firm of the Bank of Breckinridge, and that in consideration of money paid and the relinquishment by him of all claim upon the trust fund created by Luce, they, as well as Cooper, as between themselves, released him from all liability created by said bond on the judgment rendered thereon, or Cooper's payment of five hundred dollars on the judgment. The first contention of the appellant is, that this evidence is incompetent. To state the objection in the language of counsel: "The allowance of the question and answer to go to the jury, is the allowance of oral proof to vary the terms of a solemn judgment of a court upon a sealed instrument, fixing the status of all parties thereto, and to change the relative rights of the parties thereto; and this, too, by the testimony of a witness who is known to have assumed the obligations of a bond indemnifying the defendant in this case against his liability as a principal judgment debtor." This objection and others presenting the same question, rest upon a misconception as to the effect of a judgment against several defendants as between themselves, in subsequent litigation growing out of the same transaction. In such case, does the judgment conclude the parties, or may the real facts be shown? In such case the several defendants are not adversary par-

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ties, and the judgment might be entered on the allegations of the plaintiff. The questions of right between the several defendants might not be at all material in that action, but might become so in a subsequent action between the defendants themselves. In such case, there is no reason why the truth may not be shown, and there is nothing in the rule of law on this subject to preclude it. On the contrary, it is held by all the authorities, so far as I have been able to discover, that the judgment does not conclude said defendants in such case. "Parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they were adversary parties in the original action. If A recover a judgment against B and C upon a contract, which judgment is paid by B, the liability of C to B in a subsequent action for contribution is still an open question, because as to it no issue was made or tried in the former suit. As between the several defendants therein, a joint judgment establishes nothing but their joint liability to the plaintiff. Which of the defendants should pay the entire debt, or what proportion each should pay in case each is partly liable, is still unadjudicated; but a judgment against two joint debtors prevents either from denying the existence and obligation of the debt, though he may still prove, by any competent evidence in his power, that the whole burden of the obligation should be borne by the other." (Freeman, Judg. § 158; *McMahan v. Geiger*, 73 Mo. 145; 39 Am. Rep. 489; *Buffington v. Cook*, 35 Ala. 312; 73 Am. Dec. 491; *Gardner v. Raisbeck*, 28 N. J. Eq. 71; *McCrory v. Parks*, 18 Ohio St. 1; *Cox's Admrs. v. Hill*, 3 Ohio, 412; *Duncan v. Holcomb*, 26 Ind. 378; *Dent v. King*, 1 Ga. 200; 44 Am. Dec. 638; *Harvey v. Osborn*, 55 Ind. 535; *Walters v. Wood*, 61 Iowa, 290.)

Counsel next insists that the evidence offered by the defendant, tending to prove that after the rendition of the judgment in Minnesota upon the bond and the payment of five hundred dollars thereon by Cooper, he, Cooper, released the defendant from all liability to him on account

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of such payment, is incompetent. The ground of this objection does not very distinctly appear from the brief. One objection is that there was no consideration for the release. A release, like every other contract, must be supported by a consideration or else it is a *nudum pactum*; but here a sufficient consideration is alleged, and there is some evidence in the record tending to prove the same. The defendant could not put his whole case before the jury at one time, nor elicit all the testimony necessary to support it from one witness. He might prove the consideration by one witness and the fact of the release by another. Whether he did so or not was a question for the jury. The evidence objected to on this point tended in some degree to prove that Cooper released the defendant from all claim or liability on account of the payment by him of this five hundred dollars on the judgment; somewhat remote, it is true, but it related to that subject and could have no other effect. Some of the answers appear not to be altogether responsive to the interrogatories, but the interrogatories were proper, and in such case the appellant should have moved to exclude the answers, and not have rested on his objection to the interrogatories. It is proper to add that this evidence was taken outside of the state upon interrogatories, and this was the only course left open to the appellant.

The last objection is to the charge. The part excepted to is as follows: "If he, Cooper, made this agreement, that he would not demand the payment of the five hundred dollars back from Stewart in consideration that he be released from further liability, it is binding, and plaintiff cannot recover." This instruction fails to state the entire consideration as the same was disclosed upon the trial. Whether the payment of five hundred dollars, being a less amount than was due, and only a part performance of what the defendant was already bound to do, may be questioned; but he did more than this: he paid five hundred dollars for Yeaton as well as five hundred dollars for himself, and

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then relinquished to Peak, Schroeder, and Cooper all his interest in the trust property assigned and conveyed to indemnify and save harmless the persons named, as well as Yeaton and the defendant. These acts constituted a sufficient consideration for the release. There was evidence on the subject before the jury; and if, through oversight or otherwise, the court did not put the instruction as broadly as the defendant was entitled to have it, the plaintiff cannot complain. The omission did her no injury, and it did not mislead the jury; and the verdict being for the right party, the same will not be disturbed.

Let the judgment be affirmed.

[Filed April 18, 1892.]

G. W. VEDDER v. MARION COUNTY.

COUNTY ROADS—POSTING COPIES OF NOTICE—CASES LIMITED.—In proceedings to lay out, alter, or vacate county roads, it is sufficient to post copies instead of originals of the notice of the presentation of the petition. *Minard v. Douglas Co.* 9 Or. 206, and *King v. Benton Co.* 512, limited.

IDEM—NOTICES—AFFIDAVIT OF PETITIONER—STARE DECISIS.—A petitioner is competent to make affidavit of the posting of notices in proceedings to establish or vacate highways. *Gaines v. Linn Co.* 21 Or. 425, followed and approved.

VACATION OF ROAD—SUFFICIENCY OF PETITION—CASE IN JUDGMENT.—The petition in this cause is examined, and held to sufficiently describe the road sought to be vacated.

Marion county: R. P. BOISE, Judge.

Plaintiff appeals. Reversed.

This is a proceeding by writ of review to inquire into the regularity and sufficiency of certain proceedings had in the county court of Marion county, Oregon, in the matter of laying out a certain county road, and also vacating a portion of a county road in said county. The petition presented to the county court is as follows:

"To the county court of the state of Oregon, for the county of Marion: The undersigned, your petitioners,

32	264
24	409
29*	619
33*	982
22	264
28	85

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respectfully ask for the location and establishment of a county road commencing at the northwest corner of the donation land claim of W. Eastham, in section 25, township 5 south, range 1 west, in the said county of Marion; thence north about one hundred and sixteen rods to the center of the county road leading from Shuck's mill, in said Marion county, to the town of Woodburn, in said county. Application will also be made at the same time to said court to vacate all that portion of the present county road leading from said Shuck's mill to said town of Woodburn, which is situated between the termini of said proposed road, and which runs diagonally across the land claim at present owned by G. W. Vedder and Joseph Shafer, respectively, in said Marion county. Your petitioners further represent that thirty days last prior to said third day of June, 1891, they caused to be posted, in the manner provided by law for road notices, three several copies of the road notice hereinafter set out, in three several public places in the vicinity of said proposed road; and one copy also of said notice they at the same time caused to be duly posted on the bulletin-board at the door of the court-house of said Marion county."

This petition was signed by twenty-eight householders of Marion county, Oregon, who resided in the vicinity of said proposed road. The petition was filed in the county court of Marion county on the third day of June, 1891.

ROAD NOTICE.

To all persons concerned: Notice is hereby given that application will be made by the undersigned to the county court for Marion county, Oregon, at their next session, to be held on the third day of June, 1891, at the court-house in said county, to lay out and establish a county road, commencing at the northwest corner of the donation land claim of W. Eastham, in section 25, township 5 south, range 1 west, in said county of Marion; thence north about one hundred and sixteen rods to the center of the old road

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leading from Shuck's mill, in said Marion county, to the town of Woodburn, in said Marion county. Application will also be made at the same time to said court to vacate all that portion of the present county road leading from said Shuck's mill to said town of Woodburn, which is situated between the termini of said proposed road, and which runs diagonally across the land claims at present owned by G. W. Vedder and Joseph Shafer, respectively, in said county of Marion.

This notice was also signed by the twenty-eight petitioners.

There are several affidavits in the record filed to prove the service of the notice, but they are all about in the same form. This will serve as a sample of the same:

"State of Oregon, county of Marion, ss.

"I, D. A. McKee, being duly sworn, say that I posted three copies of the annexed road notice in three public places in the vicinity of said proposed road, as follows: On the fourth day of May, 1891, to wit, one of said notices I posted on a large fir tree near the forks of the road leading from Shuck's mill to Gervais on the side of said tree facing the road, where the traveling public could see and read the same. The second notice I posted on a large fir tree on the road from Shuck's mill to Gervais about one-fourth of a mile west of where the first copy of said notice was posted, as aforesaid, and on the side of said tree facing said road and within the distance of the traveling public who pass on said road that would easily enable them to see and read said notice. The third copy of said notice I posted on a large fir tree on the same road that the second copy of said notice was posted, as aforesaid, at the southeast corner of B. F. McKee's land and on the side of said tree facing said road where the traveling public could easily see and read the same."

This affidavit was signed by said McKee and properly verified. G. W. Vedder, one of the petitioners, filed a like

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affidavit, showing he posted three copies of the notice at various places, which are specified, along the line of said proposed road, and a fourth copy he posted on the bulletin-board in the hall of the court-house of said Marion county near the court-house door, all being public places in the vicinity of said proposed road. On the same day the sheriff of said county also posted a copy of said notice on said bulletin-board. On the third day of June, 1891, the county court, after reciting in its record the various jurisdictional matters enabling it to act, made an order appointing viewers and a surveyor to view said road as well as the proposed vacation, and required them to meet at the place of beginning of said road on the eighteenth day of June, 1891. Thereafter the viewers returned into court their report, accompanied by a survey of said road, recommending the proposed road be established, and that the part specified in the petition be vacated as prayed for by the petitioners. On the eighth day of July, 1891, four persons appeared in said county court and made affidavit in substance that McKee was not a sheriff or deputy sheriff, nor specially appointed by the sheriff or by any court or judge to serve said notices, and that Vedder was a petitioner. Based on said affidavit, the persons making the same appeared specially through and by their attorney and moved to quash and set aside the proof of service, which motion was allowed by the court and the proceedings dismissed at the costs of the petitioners. And thereupon said petitioners sued out this writ of review. Thereafter, on the return of said writ to the circuit court with all the proceedings annexed, said court found no error in the proceedings of the county court and affirmed its judgment, from which the appellants have brought this appeal.

Bonham & Holmes, for Appellant.

D'Arcy & Bingham, and *W. M. Kaiser*, for Respondent.

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STRAHAN, C. J.—Inasmuch as none of the papers in this record is claimed to be defective in form, it will be most convenient to notice the separate objections urged by counsel in support of the ruling of the court below, and thus confine the discussion to the narrowest limits.

The first objection made is to the proof of the service of the notices—copies of the original being posted and not original notices. The statute on the subject of notice is as follows: "When any petition shall be presented for the action of the county court for laying out, alteration, or vacation of any county road, it shall be accompanied by satisfactory proof that notice has been given by advertisement, posted at the place of holding county court, and also in three public places in the vicinity of said road, or proposed road, thirty days previous to the presentation of said petition to the county court, notifying all persons concerned that application will be made to the said county court at their next session for laying out, altering, or vacating such road, as the case may be." (Hill's Code, § 4063.) The next section empowers the county court to act upon the presentation of such petition and proof that notice has been given as provided in the last section, etc. It will be observed that the section is entirely silent as to whether the notices posted should be copies or originals; and in the absence of a legislative requirement on that subject, we must in this, as in all cases when we are called upon to construe an act of the legislature, be governed by the language used; or if that be uncertain or impracticable, then by the ordinary rules of interpretation. In this case both reason and all of the analogies of the law tend to sustain the practice of posting copies. Practically, where several notices are written at the same time by the same hand, and each is a counterpart of the other, in a general sense each might be said to be a copy. At least there is nothing in the simple fact of so preparing them as necessarily to make one an original and the other copies. But we must here

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assume, because the record so recites, that the notice posted were copies, and the question is, whether or not the posting of copies is sufficient. When the petitioners present their petition to the county court for its action, it must be accompanied by satisfactory proof that notice has been given by advertisement posted, etc. This posting is nothing more than a statutory method of constructive service. If personal service had been authorized or required, according to all the analogies of the law it would have been by serving a copy of the notice; and no reason can be suggested that is at all satisfactory why a party may not be constructively served by posting a copy when the law does not expressly require a different method. Notices generally are served by copy. (Hill's Code, §§ 527, 529.) Notices of appeal to this court are served by copy. (Hill's Code, § 537.) And so is a summons. (Hill's Code, § 55.) If the evidence of a copy is a sufficient foundation for the most solemn judgments and proceedings in the courts of general as well as appellate jurisdiction, no good reason appears why it is not sufficient authority to enable the county court to act in laying out a county road. *Minard v. Douglas County*, 9 Or. 206, was relied upon by counsel for the respondent as an authority on this point. The language of the court in that case does not directly declare that the notices posted must be originals, though the implication is pretty strong that the writer of that opinion thought that to be the correct rule; and since its promulgation the bar has generally regarded that case as establishing that doctrine. But if that rule be delucible from that case, it cannot receive our sanction or approval, and to that extent that case may be regarded as no longer authority. And we deem it a fitting occasion to say in relation to that case, as well as the case of *King v. Benton County*, 10 Or. 512, which followed it, that they introduced a degree of strictness and technicality into the practice in the matter of location of county roads that renders it unnecessarily onerous and expensive, and which is at variance

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with the entire course of procedure which had prevailed here since the territorial days and up to the time those cases were decided. Nor did the court seem to notice or give any weight whatever to the principles of contemporary construction in such case, which is frequently allowed to have a controlling effect in such matters. Viewing these cases in that light, the tendency is now to limit their doctrines, or at least to see that they are not extended.

The other question, that a petitioner is incompetent to make proof of the posting of notices, was not insisted upon for the reason it had already been decided adversely to the respondent in *Gaines v. Linn County*, 21 Or. 425.

Whether it is a proper practice to unite in the same application a request for the location of a county road and the vacation of a part of a road, we need not consider, because there is no objection made by the proceeding on that ground. We can readily imagine a case where the location of the new road would virtually supersede the old or render it useless or unnecessary. In such case we see no objection to such practice. On the other hand, if there be no connection or relation whatever between the two, no doubt that the better practice would be to prosecute them by separate proceedings. But particular objection is made to that part of the petition relating to the vacation of the part of the county road mentioned, on the ground that the terminal points are not sufficiently specified. The objection is merely technical, but it is not sound. The road is clearly identified. It is the present county road leading from said Shuck's mill to said town of Woodburn, and the part to be vacated is situated between the termini of said proposed road, but runs diagonally across the land claim at present owned by G. W. Vedder and Joseph Schafer, respectively, in said Marion county. This description may not be quite intelligible without reference to the survey. The proposed road does not run across these farms. The old one does, but the terminal points are the same; and taking the two

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descriptions together, the latter is rendered sufficiently certain.

The judgment appealed from is reversed, with directions to the circuit court to remand the cause to the county court to be there further proceeded with in accordance with this opinion.

BEAN, J., concurs. LORD, J., expresses no opinion.

[Filed April 18, 1892.]

PHILIP WIST v. GRAND LODGE A. O. U. W.

MUTUAL BENEFIT SOCIETIES—NEW LEGISLATION—EXERCISE OF POWERS.—The right of mutual benefit societies to alter, amend, or repeal their laws, or to enact others consistent with the purpose for which they are organized, is well recognized; but this right must not be so exercised as to operate as a repudiation of their obligations, or to work a forfeiture of rights previously vested in their members.

IDEM—RETROACTIVE LAWS—IMPOSSIBILITY OF COMPLIANCE.—New legislation of mutual benefit societies will not be construed as retroactive if such a result can be avoided; but even if such construction be inevitable, the law will not be allowed to apply to a case where, without any fault of his own, it is impossible for a member to comply with its requirements.

Multnomah county: E. D. SHATTUCK, Judge.

Defendant appeals. Affirmed.

W. D. Hare, Geo. H. Durham, and H. G. Platt, for Appellant.

The change made by the defendant in its fundamental law relating to the persons whom a member is entitled to designate as his beneficiary, is binding upon a member who had theretofore made a designation in conflict with the amended law of the order, and such change is also conclusive of the rights of such beneficiary. (Bacon Ben. Soc. § 304; *Harley v. Heist*, 86 Ind. 196; S. C. 44 Am. Rep. 285; *Damron v. Penn. Mut. Ins. Co.* 99 Ind. 478; *Byrne v. Cusey*, 70 Tex. 247.)

Argument of counsel.

The pleadings show that Freeman agreed in writing "that compliance on my part with all the laws, regulations and requirements which are or may be hereafter enacted by said order, is the express condition upon which I am to be entitled to participate in the beneficiary fund, and have and enjoy all the other benefits and privileges of said order." We say then that by signing that agreement he not only recognized the laws in force at the time he joined, but he contracted with reference to those which might be enacted and thereby made them become a part of his contract. (Niblack Mut. Ben. Soc. § 166; *Supreme Commandery v. Ainsworth*, 71 Ala. 436; S. C. 46 Am. Rep. 332; *Durian v. Central Verein*, 7 Daly, 168; *Byrne v. Casey*, 70 Tex. 247; *Miller v. Assurance Association*, 42 N. J. Eq. 459; *Splawn v. Chew*, 60 Tex. 532.) We insist that inasmuch as the laws of this order, which are before the court, show that the plaintiff had his right of appeal from the decision of the grand lodge to the supreme lodge, he must exhaust that remedy before he can maintain this action; and in order to make his complaint state facts sufficient to constitute a cause of action, he should have averred that he had appealed from the decision of the grand lodge, which he says refused to pay his claim, to the appellate body, and that that body had also declined to give him any relief. (Niblack Mut. Ben. Soc. §§ 130, 133; *Poultney v. Bachman*, 31 Hun, 49; *Harrington v. Association*, 70 Ga. 340; *White v. Brounell*, 2 Daly, 329; *Redmen v. Schmidt*, 57 Md. 98.)

W. S. Relfe, and Ronald & Piles, for Respondent.

Where the primary purposes of the association of the Ancient Order of United Workmen is to provide a benevolent fund to be paid on the death of each member and the avowed fraternal character of the organization is merely incidental thereto, it is a life insurance company. (*State v. Bankers etc. Assoc.* 23 Kan. 499; *Folmers Appeal*, 87 Pa. 133; *Ill. Masons Ben. Socs. v. Winthrop*, 85 Ill. 537; *Illinois etc. Soc. v. Bald-*

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win, 85 Ill. 479; *State v. St. Louis etc. Asso.* 6 Mo. App. 163; *Bolton v. Bolton*, 73 Me. 299; *Bacon Ben. Soc.* § 51; *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457; *Holland v. Taylor*, 111 Ind. 121; *Supreme Lodge v. Schmidt*, 98 Ind. 374; *Presbyterian Assur. Fund v. Allen*, 106 Ind. 593; *State ex rel. v. Merchants' etc. Soc.* 72 Mo. 159; *Elkhart etc. Soc. v. Houghton*, 103 Ind. 291; 53 Am. Rep. 514; *Comm. v. Wetherbee*, 105 Mass. 149; *Block v. Valley Mut. Ins. Asso.* 52 Ark. 204; 20 Am. St. Rep. 166; *Rockhold v. Canton Mut. Ben. Soc.* 129 Ill. 459; *Goodman v. Jedediah Lodge*, 67 Md. 127; *Bauer v. Samson Lodge*, 102 Ind. 262; *Brace v. Chartrand*, 12 Law Rep. Ann. 209.)

The defendant claims a forfeiture on the ground of the failure of the assured to comply with an alleged law, enacted subsequent to the issue of the certificate or policy. By all rules of interpretation and construction, the law referred to, which has been already quoted, even if it took effect prior to Freeman's death, could not be construed to have any other than a prospective operation. It is a settled rule that all laws are prospective in the operation, unless made and expressly declared in their terms to be retroactive. There is nothing of all this in the provision alluded to. (Endlich Interp. Stat. §§ 271-273; *People v. Supervisors*, 63 Barb. 85; *State v. Greer*, 78 Mo. 188; *Garrick v. Chamberlain*, 97 Ill. 620; *Chicago v. Ramsey*, 87 Ill. 348.)

While a subsequent law, because of the assent of the member, may add new terms or conditions to a certificate, terms or conditions reasonably calculated to promote the general good of the membership, and may be valid and binding, it does not follow that a law operating a destruction of a certificate or a deprivation of all the rights under it would be of any force. (*Korn v. Mutual Aid Society*, 6 Cranch, 192; *Supreme Commandery v. Ainsworth*, 71 Ala. 436; 46 Am. Rep. 332; *Kent Quicksilver v. Mining Co.* 78 N. Y. 178; *Morrison v. Wisconsin O. F. Mutual etc. Co.* 59 Wis. 162; *Warnebold v. Grand Lodge A. O. U. W.* 48 N. W. Rep. 1069, Iowa, May 27, 1891; *Cook Corp.* § 700 a; *People ex rel.*

Argument of counsel.

v. *Fire Department*, 31 Mich. 465; *Skillings v. Massachusetts Benevolent Association*, 146 Mass. 217; *People ex rel. v. Crockett*, 9 Cal. 113.)

Where a corporation issues a policy of insurance payable to a third person on the death of the assured, and the assured pays all of his assessments, which are accepted by the corporation with knowledge of all the facts connected therewith, it cannot, after the death of the assured, resist payment to the beneficiary upon the ground that he is neither a relative nor a dependent of the assured, and that its charter authorizes it to pay such persons only. (*Eastman v. Prov. Mut. Rel. Assn.* 65 N. H. 176; 23 Am. St. Rep. 29; *Massey v. Rochester Mut. Soc.* 34 Hun, 254; *Denver Ins. Co. v. McClellan*, 9 Col. 11; 59 Am. Rep. 134; *Camden & A. R. R. Co. v. May's Landing*, 48 N. J. L. 530; *Wood v. Corry Water Works*, 44 Fed. Rep. 146; *Morrison v. Wisconsin O. F. Mut. Ins. Co.* 59 Wis. 162; *Bradley v. Ballard*, 55 Ill. 418; 8 Am. Rep. 656; *Darst v. Gale*, 83 Ill. 140; 2 Morawetz, Corp. §§ 689-694.)

If a private corporation has accepted and enjoyed the full benefit of a contract, the same having been fully performed by the other party thereto, who has no adequate relief at his command, the defense of *ultra vires* may be disallowed. The corporation is estopped. (*Reese v. Mut. Ben.* 26 Barb. 556; *Buckbee v. U. S. Ins. Co.* 18 Barb. 541; *Insurance Co. v. Jones*, 62 Ill. 460; *Ingersoll v. Knights Golden Rule*, 47 Fed. Rep. 272.)

The other proposition urged by appellant, to wit, that no cause of action is stated, and that the circuit court had no jurisdiction because any member is given the right to appeal from the decision of the supreme lodge, is untenable. This provision in the laws of the order does not refer to the enforcement of any specific contracts of the character here in suit, but only to the methods of dealing with the members in their personal relations as such with the order. Again, if it had any force or effect as contended, the provision is not mandatory, but merely permissive. It would

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be a remedy merely cumulative and not exclusive. (*Malcom v. Rogers*, 5 Cow. 193; 15 Am. Dec. 464; *Medbury v. Swan*, 46 N. Y. 202; *State v. R. R. Co.* 51 Mo. 532; *Spaulding v. Suss*, 4 Mo. App. 541; *Baldwin v. Mayor*, 2 Keyes, 410; *Bradfield v. Union Mutual etc.* 9 Wkly N. Cas. 436; *Rosenberger v. Wash. Mut. Fire Ins. Co.* 87 Pa. St. 207; *Bauer v. Samson Lodge*, 102 Ind. 262; *Supreme Council v. Garrigus*, 104 Ind. 133; 54 Am. Rep. 298.)

LORD, J. — This is an appeal from a judgment of the circuit court for Multnomah county in favor of the plaintiff in an action brought to recover the sum of two thousand dollars, the amount alleged to be due on a benefit certificate which had been issued by the defendant society to Frederick Freeman for the benefit of the plaintiff. The cause was tried by stipulation before the court, without the intervention of a jury. In substance, the facts found show that at different times during his membership in the association, Frederick Freeman held two of its benefit certificates. In the first certificate which was issued to him he had designated his wife, Anna Freeman, as his beneficiary; but when she ceased to be his wife, he surrendered that certificate and took a second certificate, in which he designated the plaintiff Philip Wist as his beneficiary. His application upon which the certificate was issued expressly provided that "compliance on his part with all the laws, regulations and requirements which are or may hereafter be enacted by said order is the express condition upon which I am entitled to participate in the beneficiary fund, and have and enjoy all the other benefits and privileges of said order." In July, 1888, the society changed its law relating to the classes of persons who might be designated as beneficiaries, to read as follows: "Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall, in every instance, be one or more members of his family, or some one related to him by blood, or who shall be dependent

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upon him." A circular letter of the grand recorder, issued in 1889, and a few months before Freeman's death, notified the members of his jurisdiction of the change in the law relative to beneficiaries. Shortly thereafter, Freeman died in good standing, with all dues and assessments required of him fully paid and discharged. The plaintiff Philip Wist was not a member of his family nor related to him by blood, nor dependent upon him. Freeman never changed his last beneficiary certificate after it was issued to him. There is no claim that he did not comply with all the laws of the order, except that he did not change his beneficiary certificate by designating some one of the specified classes, which the circular letter undertook to declare that members holding such certificates must do, otherwise that they were worthless. At the date the certificate was issued to Freeman in which he had designated the plaintiff as his beneficiary and continuously up to the date of his death, Freeman had no family nor any one related to him by blood or dependent upon him. The plaintiff was at the time he was designated as beneficiary in the certificate, and now is, a member of the order, and Freeman when he died was indebted to the plaintiff in the sum of six hundred and fifty dollars. The law of the order in force long prior to the death of Freeman, as well as at present, provides: "In the portion of this fund, namely, two thousand dollars, to which the beneficiaries of a deceased member are entitled, the members themselves have no individual property right; it does not constitute a part of their estate to be administered, nor have they any right or control over the same, except the power to designate the person or persons to whom as beneficiaries the same shall be paid at the death of the member. The beneficiaries thus designated have no vested right in said sum until the death of the member gives such right, and the designation may be changed by the member in the method prescribed by the laws of the order at any time before his death." This

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declaration of the law of the order in respect to the rights of beneficiaries in the fund to be accumulated as not being a vested right, is in accord with the general principles of the law as declared by the courts, applicable to benefit or charitable associations. Except as restricted by the constitution and by-laws of the order, a member may exercise his power of appointment without other limit; he may designate as his beneficiary whomsoever he may choose, or he may change such beneficiary by designating another at his pleasure. The only limitation on the exercise of this valuable and important power is the organic law of the society, or the rules and regulations adopted in compliance therewith. During the lifetime of the member, his beneficiary has no vested interest in the fund to be accumulated and paid at his death which would prevent him from changing such beneficiary without his consent, or which would prevent the society from changing its rules and permitting changes of beneficiaries. The laws of the society in respect to the change of beneficiaries are for the protection of its own interests and welfare, and as against such laws the beneficiaries have no such vested rights or interest in the fund, during the life of the member, as will prevent the society from determining the course of such fund. In consequence of this right of a change of beneficiary by the member, all that the beneficiary can have during his life is a mere expectancy dependent upon the will of the holder of the certificate. It is these considerations that constitute the distinction between benevolent organizations and the regular life insurance companies. This distinction has been thus expressed by MITCHELL, J.: "The essential difference between a certificate of membership in a beneficiary association and an ordinary life policy is, that in the latter the rights of the beneficiary are fixed by the terms of the policy, while in the former they depend upon the certificate and the rights of the members under the constitution and by-laws of the society. In the

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one case, the rights of the beneficiary are fixed and vested from the moment the policy takes effect; in the other, they are subject to such changes as the law of the association authorizes the member to make. All that a beneficiary has during the life of the member, owing to his right of revocation, is a mere expectancy dependent upon the will of the holder of the certificate. This expectancy is not property." (*Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 192.) So that it appears that the designation of beneficiaries by members of such associations takes effect only upon the death of such members, and that the certificate only confers upon the beneficiary a contingent expectation, liable to be divested either by the death of the beneficiary before the member or by a revocation of the appointment and a naming of another beneficiary. Upon the death of the member, the certificate takes effect, so far as to vest in the beneficiary an absolute right to the benefit money. (*Bacon Ben. Soc. & Life Ins.* § 155.) Nor have the members of such societies, as such, any interest or property in the benefit fund, but simply the power to appoint some one to receive it. But while it is true that the right of the members of benefit societies in the sums agreed to be paid at death is simply the power to appoint a beneficiary, and that the constitution or charter and the by-laws are the foundation and source of such power, yet, as Mr. Bacon says, "the cases must not be understood to hold that the member of a benefit society has not a property right in the contract of membership, under which he has the power to designate a recipient of the benefit to be paid, because of such membership and under the contract. The right of the member in this contract is a valuable one, which the courts will at all times recognize and protect, although strictly speaking such member has no property interest in the benefit paid, or subject of the power. The membership which includes the right to pay the agreed consideration and to appoint a person to take the benefit, must be

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regarded as a species of property, and is to be distinguished from the benefit or sum paid itself in which the member has no property." (Bacon Mut. Ben. Soc. & Life Ins. § 237.)

At the time when Freeman designated the plaintiff as his beneficiary, and the society issued to him a certificate accordingly, it was a valid exercise of his power of appointment. There was at that date no rule or regulation of the society in conflict with his right to make such designation of his friend and fellow member, his beneficiary; and if Freeman without revoking his appointment of the plaintiff had died before the society had enacted the law in question limiting the appointment of beneficiaries to a certain specified class, there is no doubt or dispute as to its liability. The general rule undoubtedly is, that a designation of a beneficiary, valid at its inception, remains so; and as Freeman never revoked the appointment of the plaintiff as his beneficiary unless the after-enacted law required Freeman to change his beneficiary so as to conform to the classes specified and become a part of his contract, and the law is valid in so far as it affected his contract, the appointment of the plaintiff as his beneficiary is still valid, and the certificate took effect upon the death of Freeman, and vested in the plaintiff an absolute right to the benefit money.

The contention for the defendant is, that the law enacted by the society subsequently to the issuance of Freeman's benefit certificate, relating to the persons whom a member is entitled to designate as his beneficiary, became a part of his contract and required him to make a designation of a beneficiary in conformity therewith, and that on his failure to do so before his death, without leaving any one capable of taking such benefit certificate, it reverted to the beneficiary fund of the supreme lodge. This contention is founded on the assumption that the law in question was retroactive and intended to annul the appointment of beneficiaries theretofore made by members which did not belong to the classes specified in such law. The benefit

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certificate which was issued to Freeman was based upon his written application. By his application, he agreed to comply with "all laws, regulations, and requirements which are, or hereafter may be, enacted," and in consideration of this, among other things, the defendant issued to him a beneficiary certificate. Reading the two together as constituting his contract, Freeman agreed with the society, as a part thereof, that he would comply with or be bound by its laws of future enactment as if they were already existing. But it is apprehended that contracts of this kind differ but little, if any, from contracts in other such societies, where the power is reserved to alter or amend, enact or repeal its laws. A person who becomes a member of such an association is bound to take notice of its laws, and especially those which affect his rights and interests. These laws are elements of his contract, and determine the extent of his duties, rights, and liabilities. The right of such societies to alter, amend, or repeal laws, or to enact others consistent with the purpose for which they are organized, is well recognized. The power is essential to their continued existence and well being, and except as restrained by the fundamental law of their organizations, may be exercised at all regular meetings. This power to amend laws, or to repeal them, is inherent and continuous for all proper objects. No member has a right to presume that the laws of his order will remain unchanged, when the promotion of its interest and welfare may require a change. "The power of the society to enact its laws," says Mr. Niblack, "is continuous, residing in all regular meetings of the society so long as it exists. Any meeting can, by a majority vote, modify or repeal the law of a previous meeting, and no meeting can bind a subsequent one by irrevocable acts or rules of procedure." (Niblack Mut. Ben. Soc. § 124.) So that it may be said that the power to alter or amend laws, or to repeal them, when exercised in a proper way and for the welfare of the society, is an

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incident of its existence, and that when so exercised, such laws are binding on its members, except when forbidden by the organic act of the society, or contrary to the laws of the land. As ELLIOTT, J., said: "We do not affirm that a benefit society may, by a change in its by-laws, arbitrarily repudiate an obligation created by a policy of insurance; but we do affirm, where a change is regularly made in its by-laws, and the motive which influences the change is an honest one, to promote the welfare of the society, and the members are all given an opportunity to avail themselves of the change, no actionable wrong is done the members or their beneficiaries." (*Supreme Lodge K. P. v. Knight*, 117 Ind. 497.)

There is no power in the society to amend or enact laws which shall work any repudiation of its obligation. It resides in the society for the purposes of carrying out the objects for which it was formed; and, when the power is expressly reserved in the charter, it is not construed as intended to reserve the power to avoid its contracts, or work the destruction of vested rights. So that a party's contract of insurance may be modified or varied by a subsequent law, and he be bound by it, either through the reserved power in the society to amend or enact such law, or by his contract with reference to future enactments, when it does not operate as a repudiation of its contracts, or a complete deprivation of the member's rights. As the rights of the plaintiff are derived from the contract of Freeman with the society, and as his benefit certificate, designating the plaintiff as his beneficiary, was issued before the enactment of the law limiting the persons whom a member is entitled to designate as his beneficiary, it now becomes necessary to examine this subsequent law, and ascertain whether it is applicable to benefit certificates of members which were issued before its enactment, and if so, to what extent. That law provides: "Each member shall designate the person or persons to whom the beneficiary fund due at his death

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shall be paid, who shall in every instance be one or more members of his family, or some one related to him by blood, or who shall be dependent upon him." This language is wholly prospective in its operation. It is only intended to affect the power to appoint beneficiaries and limit its exercise after the law passed. "Each member shall designate," refers not to a past but a future act to be performed by him,—that is, whenever a member shall exercise his power of appointment under this law, he shall designate a beneficiary of the classes enumerated. It applies as well to old members, revoking a former appointment and naming another as his beneficiary, as to new or old members who have never exercised their power to appoint a beneficiary. The law does not undertake by its terms to disturb what has been done; it does not nullify previous appointments; it only undertakes to limit to the classes specified the power to designate beneficiaries, whenever it shall be exercised by a member. It is a settled rule of construction that laws will not be interpreted to be retrospective, unless by their terms they are clearly intended to be so. They are construed as operating only on cases or facts which come into existence after the laws were passed. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed, must be presumed, out of respect to the legislature, to be intended not to have a retroactive operation. (Endlich *Interp. Stat.* § 273.) Rights will not be interfered with unless there are express words to that effect. It is not enough that upon some principles of interpretation a retroactive construction could be given to the law, but the intent to make it retroactive must be so plain and demonstrable as to exclude its prospective operation. "It is not enough that general terms are employed broad enough to cover

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past transaction," for laws "are to be construed as prospective only, if possible." (Sedg. Stat. & Const. Law, 161.)

In fact, so great is the disfavor in which such laws are held, and so generally are they condemned by the courts, that they will not construe any law, no matter how positive in its terms, as intended to interfere with existing contracts or vested rights, unless the intention that it shall so operate is expressly declared, or is to be necessarily implied. As the law of the society is prospective in its operation, it did not affect Freeman's contract with the defendant. It did not, by its terms, nor by implication, require him to change his policy. It would only have affected his contract in the event he should have revoked the appointment of the plaintiff as his beneficiary, and then only to the extent of requiring him to appoint a beneficiary that should belong to the specified classes. There is not a word in the law requiring any member to make a change of his beneficiary; or in case of his failure to do so, as contended for by the appellant, that his benefit certificate reverted to the society. It may be conceded that Freeman was bound by all subsequent laws enacted, but as the law in question is not retroactive, it does not affect his contract. It only affects him or any other member of the society in the issue of certificates after its passage. While there is no pretense that this contract was a cover for speculation, or a wager policy, it may be conceded that the object of the law was to discourage wager policies. And it was said by counsel, unless it was held "that the society could amend its laws so as to discourage wager policies, it will be involved in a maze of difficulties." By giving this law a prospective operation, it will greatly cut off the opportunities for such speculation in life insurance policies, and will in a great measure remedy the evil it was designated to abate, without denying the power of the society to amend its laws, or to enact others for the promotion of its interests and welfare.

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But we may go further, and admit that the law is retroactive; that it was intended, as claimed by counsel, to affect certificates, naming beneficiaries, not of the classes enumerated, and requiring the holders of such certificates to designate others conformable to such law; otherwise upon their failure to so do, that the fund payable under their certificates to such beneficiaries as do not belong to any of such classes would descend under the laws of the society or revert to it; and still we do not think such a law would be construed to affect the certificate of Freeman, or the class to which he belongs, or their beneficiaries. It is only addressed retroactively to those who can comply with its terms; for while it might have the effect to modify or vary the contracts of all such, it does not operate as a destruction of their power to appoint a beneficiary, or as a repudiation of the obligation of the society. They can comply with its terms and make the change of beneficiary and preserve the fund for his benefit. The case is different with Freeman or those belonging to his class, who, prior to the time the law was enacted, had appointed the plaintiff as his beneficiary, and who, from the time of such appointment continuously up to his death, had no family, nor any one related to him by blood, nor dependent upon him. It was not possible for him to comply with the terms of the law by naming another beneficiary. To give the law such a construction as would include his class, would operate as a complete deprivation of their rights, and an absolute repudiation by the society of its obligations. Such an injustice will never be tolerated, if by any construction it can be avoided. We are bound to construe a law, if we can, so as to make it operative, without impairing the obligation of existing contracts, or divesting vested rights.

We may, therefore, assume, for the purposes of the case, that the law was retroactive, and intended to require a change of beneficiaries, limiting them to the classes specified, and still we would be bound to construe it so as to

make it operative and valid, which can only be done by confining its operation to those members who could make the change. So averse are courts to giving a law a retroactive operation, that even where the retroactive character of the law is clearly indicated on its face, they always subject it to the most circumscribing construction that can possibly be made consistent with the intention of the legislature. In *Hedges v. Rennaker*, 3 Met. (Ky.) 258, the court says: "It has been said by this court that retrospective statutes have ever been regarded as impolitic and unwise, as they are in general unjust and oppressive. And although such statutes have been held valid under the constitution, they have always been subjected to such a construction as would circumscribe their operation within the narrowest possible limits consistent with the manifest intention of the legislature, to be drawn from the language used."

The argument of counsel that Freeman's failure to designate a beneficiary before his death, operated to vest the fund in the society, assumes that he failed to do something, which, under the law, he could have done, or neglected to do, and which would have prevented such result, and preserved the fund for the benefit of his beneficiary. As we have assumed only for their sake that the law is retroactive, this argument only strengthens our construction that it should be construed as only applicable to those who could make the change, and refused or neglected to do it before they should be visited with the consequences of forfeiture.

Nor does the case upon which counsel rely support their contention. I refer to the case of *Supreme Commandery v. Ainsworth*, 71 Ala. 436; 46 Am. Rep. 332. There, the legislature provided that a policy should be rendered void in case the holder of the certificate committed suicide. In that case, the certificate was accepted by the assured, subject to the laws of the order now in force, or which hereafter may be enacted by the supreme commandery, and the court by BRICKELL, J., said: "Parties may contract in reference to laws of future

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enactment,—may agree to be bound and affected by them as they would be bound and affected if such laws were existing. They consent that such laws may enter into and form parts of their contracts, modifying or varying them. * * * The statute prescribing the condition of official bonds, and the bonds of executors, administrators, and guardians, extends the liability of the surety to the performance by the principal of such duties as are required of him by existing laws, or by any law passed subsequent to the execution of the bond. There is no injustice in the statute. Nothing retrospective in its operation.” But the court, as if having in mind the case at bar, added: “While a subsequent law, because of the assent of the member, may add new terms or conditions to a certificate,—terms or conditions reasonably calculated to promote the general good of the membership and may be valid and binding,—it does not follow that a law operating a destruction of the certificate or a deprivation of all rights under it would be of any force.” (*Korn v. Mut. Assn. Soc.* 6 Cr. 192.)

In our view of the case, therefore, we do not think that the law in question is retroactive, or that it affects the certificate of Freeman, or the rights of his beneficiary under it; or if it be considered to have a retroactive operation, that it applies to certificates held by those members who cannot comply with its terms, and whom to construe it to include would operate as a complete destruction of their certificate and their rights under it, and as a repudiation by the society of its obligation.

It follows that the judgment must be affirmed.

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[Filed April 28, 1892.]

STATE OF OREGON v. JOHN A. SHAW.

CONSTITUTIONAL LAW—STATUTORY CONSTRUCTION—SUBJECT OF ACT.—If all the provisions of a statute relate directly or indirectly to the same subject, are naturally connected and are not foreign to the subject expressed in the title, they will not be held to violate the requirement of the constitution of Oregon, that the subject of the act must be expressed in the title; and in applying this rule, every doubt will be resolved in favor of the validity of the statute.

CRIMINAL LAW—INDICTMENT—WORDS OF STATUTE.—In indictments for statutory misdemeanors, it is sufficient to charge the offense in the words of the statute, provided the crime is thereby set forth with such certainty as will apprise the accused of the offense imputed to him.

Marion county: R. P. BOISE, Judge.

Plaintiff appeals. Reversed.

George G. Bingham, district attorney, for Appellant.

Ford & Kaiser, for Respondent.

BEAN, J.—The defendant was indicted for unlawfully discharging and depositing sawdust, planer shavings, and other lumber waste, made by a saw mill, into the waters of the Santiam river, in violation of section 8 of an act entitled, "An act to protect salmon and other food fishes in the state of Oregon and upon all waters upon which this state has concurrent jurisdiction, and to repeal sections 3489, 3490, 3491, 3492, 3493, 3494, 3495, 3496, 3497, and 3498 of Hill's Annotated Laws of Oregon," approved February 6, 1891. A demurrer to the indictment was sustained by the court below for the reason that it does not state facts sufficient to constitute a crime, and the indictment was dismissed, from which judgment the state appeals.

To sustain the rulings of the court below, it is contended that the section under which defendant was indicted is unconstitutional and void, because in violation of section 20, article VI, of the constitution, which provides, that "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be

29	287
25	183
26	506
20*	1028
35*	34
36*	297
22	287
26	185
29*	1028
37*	538
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29	425
22	287
35	49
22	287
136	182
22	287
38	464
22	287
42	386

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expressed in the title." The history and object of this constitutional provision, and the mischief against which it was aimed, should be kept steadily in view by the courts in its construction and application. It was intended to prevent the practice, common in legislative bodies not thus restricted, of embracing in the bill matters having no relation to each other, wholly incongruous, and of which the title gives no notice, thus securing the adoption of measures by fraud and without attracting attention; or combining subjects representing diverse interests, in order to unite the members of the legislature who favored either, in support of all. These combinations being corruptive of the legislature and dangerous to the state, are prohibited in most, if not all, the states by constitutional provision similar to ours. (Suth. Stat. Const. § 78; Cooley, Const. Lim. *142.) This provision of the constitution was not designed to embarrass legislation, but to put an end to legislation of the vicious character referred to, and has been always liberally construed to sustain legislation not within the mischief. A reasonable construction permits the single subject to be comprehensive enough for practical purposes, and great latitude is allowed the legislature in stating the subject in the title. It was not designed to require the body of the bill to be a mere repetition of the title. Neither is it intended to prevent including in the bill such means as are reasonably adapted to secure the object indicated in the title. It was intended, as said by Mr. Justice COOLEY, "to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly notified of its design when required to pass upon it. But this purpose is fully accomplished when the law has but one general object which is fairly indicated by its title. To require that every end and means necessary to the accomplishment of this general object should be provided for by a separate act relating to that alone, would not only be senseless but would render legislation impossible."

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(*People v. Mahaney*, 13 Mich. 494.) It is not directed against the generality or comprehensiveness of the title to legislative enactments, nor does it require that the title shall index the details of the act. If the title cover the object of the act, the degree of particularity with which it shall be expressed or set out is for the legislature to determine. A disregard of this constitutional provision will be fatal, but the departure must be plain and manifest, and all doubts will be resolved in favor of the law. The conflict between the constitution and the law should be palpable and clear before the courts should disregard a legislative enactment upon the sole ground that it embraces more than one subject. (Suth. Stat. Law. § 82.)

If all the provisions of the law relate directly or indirectly to the same subject, are naturally connected, and are not foreign to the subject expressed in the title, they will not be held unconstitutional as in violation of this clause of the constitution. (*O'Keefe v. Weber*, 14 Or. 55; *Bowman v. Cockrill*, 6 Kan. 311; *Howland Coal and Iron Works v. Brown*, 13 Bush, 681; *Montgomery v. B. & L. Assn. Robinson*, 69 Ala. 413; *State v. County Judge*, 2 Iowa, 280; *Montclair v. Ramsdell*, 107 U. S. 147; *Cole v. Hall*, 103 Ill. 30; *Gillitt v. McCarthy*, 34 Minn. 318; *Brewster v. City of Syracuse*, 19 N.Y. 116; *Kurtz v. People*, 33 Mich. 279; *Burnside v. Lincoln Co.* 86 Ky. 423; *Hall v. Bunte*, 20 Ind. 304.) This clause is not violated by any legislative act having various details properly pertinent and germane to one general object. The question is, whether, taking from the title the subject, we can find anything in the bill which cannot be referred to that subject. The general object and purpose of the act in question here is to protect salmon and other food fishes; and whatever means may tend directly or indirectly to accomplish this object, may be properly included in the act. But it is argued that casting sawdust, shavings, or lumber waste into a stream is not in any way injurious to fish. The legislature evidently thought otherwise, for its intention is mani-

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fest. It assumes that sawdust, shavings, and lumber waste are substances calculated to destroy or injure fish when cast into a stream; and this seems to have been the opinion of the legislature for many years, for there has been since 1878 a law upon the statute books making it a crime to do so in certain localities. (Hill's Code, § 3493.) If there be any possible ground for holding this belief, it certainly is no function of a court to determine that the legislature was mistaken. Its view, not ours, must determine that question. But if it were necessary, we think we may safely assume, in view of the legislation upon the subject, that it is commonly supposed or believed that casting sawdust into a stream is injurious to the fish therein.

Again, it is claimed that section 8 is void, because its provisions are broader than the title of the act, for the reason that it is not by its terms confined to waters in which food fishes are wont to be, but is applicable to all the waters of the state. But here also the legislature has assumed that all the waters of the state contain food fishes. There is certainly some ground for holding this belief, and it is not the province of the court to say that the legislature was mistaken. It is not our opinion, but that of the legislature, which must determine that question so far as the constitutionality of the act is concerned. Whether a conviction could be had for casting any of the prohibited substances into waters which do not contain food fishes, or in which such fishes are not wont to be, if there are any such waters in the state, is unnecessary for us to consider at this time, as no such question is in the record.

It is also argued that the indictment in this case does not state a crime because it does not allege that food fishes were wont to be in the Santiam river, into which it is charged defendant cast sawdust, lumber waste, and shavings. The indictment is in the language of the statute; and it is the settled rule in this state that in indictments for misdemeanors, created by statute, it is sufficient to charge the

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offense in the words of the statute, subject to the qualification that the crime must be set forth with such certainty as will apprise the accused of the offense imputed to him. (*State v. Packard*, 4 Or. 157; *State v. Perham*, id. 188; *State v. Dougherty*, id. 200; *State v. Ah Sam*, 14 Or. 847; *State v. Light*, 17 Or. 358; *State v. Lee*, id. 488.) This indictment states the offense in the language of the statute, and clearly apprises the defendant of the offense charged against him, and is sufficient.

The judgment of the court below is therefore reversed, and the cause remanded with directions to overrule the demurrer.

[Filed April 23, 1892.]

J. W. LATIMER v. TILLAMOOK COUNTY.

COUNTY ROADS—JURISDICTION—RECITALS IN RECORD.—On a petition to vacate a county road, where the journal entry of the county court recited facts showing legal notice of the intended application, "and that these facts were made to appear satisfactorily to the court," jurisdiction will be presumed to have been acquired, though the affidavit of posting notices was ambiguous in its statement of facts.

DEED—REPORT OF VIEWERS—REMONSTRANCE.—Under Hill's Code, § 4065, which provides for locating and altering public roads, and directs that, after receiving the report of the viewers, the court shall "cause the same to be publicly read on two different days" before acting on the report, the right to remonstrate continues until after the report is read a second time.

Tillamook county: R. P. BOISE, Judge.

Defendant appeals. Affirmed.

This controversy arises out of an application to vacate a certain county road in Tillamook county. The petition among other things states in effect that the petitioners are householders in said county and state, and reside in the vicinity of the road proposed to be vacated. Said petition contained about two hundred names. The notice is in proper form, and has appended to it the same names that appear on the petition. The proof of notice is as follows: "I, L. G. Freeman, being duly sworn, say that on the sixth

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27	325
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day of December, 1890, that being more than thirty days preceding the time for the sitting of county court aforesaid, for the transaction of county business, at its regular meeting in January, 1891, I posted four notices, exact copies of the one hereto attached; and all of such notices contained the names of the persons signing the petition herein, and were signed by the petitioners; and the names and signatures are genuine, and in the handwriting of the persons purporting to sign the same. Three of said notices were posted in public places in the vicinity of the said road sought to be vacated, to wit, one each at the terminus of said road, and one posted in full view of the public on the bridge on the Wilson river, commonly known as the Freeman bridge; and one of such notices was by me, on the date herein stated, posted by me on the bulletin board at the court-house, or the place of holding county court in said county and state. All of which notices were placed in plain view of the public, and were written in plain handwriting." This affidavit was properly verified. On the eighth day of January, 1891, the county court of Tillamook county made an order appointing viewers, after reciting in the record the necessary jurisdictional matters. On the fourth day of March, 1891, a remonstrance signed by a large number of persons was presented, remonstrating against the proposed vacation. The remonstrance also contains the same recital as to the qualifications as is contained in the petition relative to the qualifications of the petitioners. Numerous objections were filed to the petitioners as well as to the remonstrators, pending which the matter was continued to the sixth day of April, 1891. On said sixth day of April, 1891, another remonstrance was filed by twenty-one other persons, who recite that they are householders and reside in the vicinity of the road proposed to be vacated. At the same time, counsel, in behalf of the petitioners, moved that said last named remonstrance be not received, for the reason it was not filed in time, which

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motion was allowed by the court, and the report of the viewers having been filed recommending that the road be vacated as prayed. The journal in substance recites, that it appearing to the court that there is not a greater number of names on said remonstrance than petitioners on the petition, which petitioners are legal signers of said petition, as by law provided, it was ordered that the report of the viewers be recorded and the road be vacated, the court having found that there were two more names on the petition than on the remonstrance.

Thereafter, on the eleventh day of August, 1891, the circuit judge allowed a writ of review to issue to remove said record into the circuit court of Tillamook county. After the return of said writ, and on the twenty-fifth day of August, 1891, said circuit court reversed the order and proceedings of the county court of Tillamook county in the matter of the vacation of said road, and rendered a judgment against said county for costs, from which judgment this appeal was taken.

George C. Bingham, district attorney, for Appellant.

T. B. Handley, for Respondent.

STRAHAN, C. J.—The questions made on this appeal which we deem material will be separately noticed.

The first is as to the sufficiency of the proof of notice. The affidavit recites that three of said notices were posted in public places in the vicinity of said road sought to be vacated, to wit, one each at the terminus of said road, and one posted in full view of the public on the bridge on the Wilson river, commonly known as the Freeman bridge, and one notice on the bulletin board at the court house, or the place of holding court in said county and state. It was suggested that this proof tended to show that the two notices were posted at the terminus, but we think this is hypercritical. The expression in the affidavit is not free from criticism; but properly understood, we think it may

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be construed that a notice was posted at each terminus of the road. In addition to this, the journal entry in the county court recites that proof of posting notices was made showing that one notice was posted at the court house and one each at the termini of said road proposed to be vacated, and one on the Freeman bridge across Wilson river, all of which notices were in public places in the vicinity of said proposed road, and that these facts were made to appear satisfactorily to the court. We can have no doubt that the proofs on file with the findings in the journal sufficiently show that the county court acquired jurisdiction. (*Dougherty v. Brown*, 91 Mo. 26; *Supervisors v. The People*, 12 Brad. 210; *Forsythe v. Kreuter*, 100 Ind. 27.)

The main fact relied on by the respondent in support of the ruling of the circuit court in reversing the action of the county court, was the rejection of the remonstrance filed April 6, 1891. This remonstrance contained twenty-one names, and the same was stricken from the files on motion of counsel for the petitioners for the reason that it was filed too late to be considered. Section 4065, Hill's Code, defines very fully the duty of the viewers and surveyor, as well as the county court, when the report is filed. By the latter part of the section, it is made the duty of the court, on receiving the report of the viewers aforesaid, to cause the same to be publicly read on two different days of the same meeting, and if no remonstrance with a greater number of remonstrators than there are names on the petition, (the names on the remonstrance to be confined to the vicinity of the proposed road,) or petition for damages be filed, * * * the court shall issue an order directing the road to be opened.

The report of the viewers was read the first time March 4, 1891, and the second time on the sixth of April, which was an adjourned term of the county court. Conceding without deciding that this meeting in April was the same meeting at which the report of the viewers was read the

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first time, which may be well doubted, the right to remonstrate continued and existed until after said report was read the second time, and was not lost at the time the second remonstrance was filed. The county court ought to have read the report a second time at its meeting in March before proceeding to consider the remonstrance then filed. Instead of following the plain requirements of the statute, however, it proceeded to receive objections to the qualifications of the petitioners and remonstrators, respectively, and was proceeding to consider the same without having read the report a second time. This necessarily put the petitioners at great disadvantage in the contest. The remonstrators knew the strength of the petition, and they knew their own strength on the remonstrance, and the oversight of the court gave them the opportunity to utilize whatever additional strength they might have in reserve, which they proceeded to do by bringing in another remonstrance. We think the right to remonstrate continued until after the second reading of the report; and though in this particular instance it may have operated as a hardship and a surprise to the petitioners, still they might have avoided it by calling for the second reading of the report in March if the court continued in session two days, which was its plain duty to have done.

There being no error in the judgment appealed from, the same must be affirmed.

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[Filed May 1, 1890.]

* E. C. KANE v. CHARLES G. RIPPEY ET AL.

ABSTRACT OF TITLE—OBJECT AND WHAT TO CONTAIN.—The object of an abstract of title is to enable the purchaser, or his counsel, to determine the sufficiency of the title. It should contain whatever concerns the source of the title and its condition.

ABSTRACT, ADMISSIBLE AS EVIDENCE, WHEN.—It may be admissible in evidence, not for the purpose of proving title, but to show that the abstract furnished to show title did not disclose such evidence of title as the defendants had agreed to convey by their contract.

Jackson county: L. R. WEBSTER, Judge.

Plaintiff appeals. Reversed.

H. K. Hanna, for Appellant.

Wm. M. Colvig, for Respondent.

LORD, J.—This is an action to recover money paid on a contract for the sale of land. It arose out of substantially these facts: That the defendants agreed with plaintiff in writing to convey to him "in fee simple, clear of all incumbrances whatsoever, by a good and sufficient deed, and abstracts of title, the following parcel of land," etc.; that at the execution of said agreement, the plaintiff paid to the defendants the sum of five hundred dollars, as provided therein, and as the first payment on said land; that prior to bringing this action, the plaintiff tendered the further sum of three thousand dollars as a second payment, and was ready and willing to perform his covenants and agreements, etc.; that he then and there demanded of said defendants that they execute and deliver to him a deed of said land, etc.; that the defendants refused to execute the same; that the title to said land is defective; that they cannot execute or deliver a clear title, etc., and make him a good and sufficient deed and abstract of title therefor, etc.; and that the defendants have not repaid any part of the sum of

*This opinion should have appeared in 19 Oregon, and to correct the error is reported here.—REPORTER.

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24	339
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five hundred dollars to them paid as a part of the purchase price, etc.

The material facts were put in issue, and after the plaintiff had introduced his evidence and rested, the defendants moved for a nonsuit, which was granted by the court, and judgment entered for the defendants. Two causes of error are assigned: (1) that the court erred in refusing to allow the plaintiff to introduce in evidence the abstract of title furnished plaintiff by the defendants, and (2) in taking the cause from the consideration of the jury and rendering a judgment of nonsuit in favor of the defendants.

It is disclosed by the bill of exceptions that, when the plaintiff offered in evidence the abstract of title, the court refused to admit it on the ground, as it would seem, that it was not the proper evidence of title, but that the records or original conveyances were the only legal proof of title admissible. The court evidently regarded the action as one in which the validity of the title and its proper proof were involved, as it is only upon this theory that the ruling of the court below can be sustained. The difficulty arises out of the somewhat involved manner in which the facts are alleged; but it is plain that the action is based on the contract, and that the real contention is as to its meaning and proper construction. The plaintiff was endeavoring to show, not that the abstract conveyed title, but that the abstract of such title furnished the plaintiff by the defendants did not exhibit the "good title, free from incumbrances" that the defendants had agreed to convey. His position, in substance and effect, was that the defendants had agreed by their contract to assure him a good title, and to furnish him an abstract thereof from which its validity and marketable quality might be ascertained and determined, but that the abstract furnished him by them for this purpose, and which the plaintiff offered in evidence, and the court rejected, showed that the title was defective, or not such as would be in accordance with the terms of such contract. The

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defendants had agreed to "convey and assure to the plaintiff in fee simple, clear of all incumbrances whatsoever, by a good and sufficient warranty deed, and abstract of title," etc., the lands described. The object of the abstract is plain; it is to enable the purchaser, or his counsel, to pass readily upon the validity of the title, as it should contain whatever concerns its source and condition. Mr. Curwen says: "The object of the abstract is to furnish the buyer and his counsel with a statement of every fact, and abstract of the contents of every deed on record, upon which the validity and marketableness of the title depend, so full that no reasonable inquiry shall remain unanswered; so brief, that the mind of the reader shall not be distracted by irrelevant details; so methodical, that counsel may form an opinion on each conveyance as he proceeds in his reading; and so clear, that no new arrangement or dissection of the evidence shall be required. The buyer has the right to demand a marketable title. He has a right to demand that the abstract of title shall disclose such evidence of that title as will enable him to defeat any action to recover or incumber the land." (Curwen, Abstract Title, § 36.)

In contracts for the sale of real estate, the principle is of constant application that it is implied that the vendor will exhibit a good marketable title before the contract is consummated; and until he do so, the buyer is not bound to accept a deed or pay the purchase money. In the case at bar, the contract is written, and the defendants agree to convey a good title free from all incumbrances whatsoever, and to furnish an abstract of such title. What was the object of this abstract? Plainly, to enable the plaintiff and his counsel to determine readily on the sufficiency of the title agreed to be conveyed by the contract—in a word, an abstract which would disclose such evidence of title as would show the title free from all incumbrances whatsoever, and defeat any action to recover the land. This being the object of the abstract, when the plaintiff submitted it to

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his counsel, as the record shows, he refused upon an inspection of it to say that it disclosed such title as the defendants had agreed to convey. Whether it does or not, the abstract is not before us for that purpose, but only to show its object as applied to the contract. When, therefore, the abstract was offered in evidence, it was not for the purpose of proving title by the abstract, but of showing that the abstract furnished did not disclose evidence of such title as the defendants had agreed to convey. It results that we think the abstract was admissible for the purpose offered, and that it was error to exclude it. This being so, it becomes unnecessary to consider the other error assigned.

The judgment must be reversed and a new trial ordered.

[Filed April 26, 1892.]**E. C. KANE v. CHARLES G. RIPPEY ET AL.**

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24	339
29*	1005
33*	930

SECOND APPEAL—FORMER OPINION—LAW OF THE CASE.—On a second appeal, the opinion of the court in the former appeal, so far as the same facts appear, becomes the law of the case and controls courts and parties in every subsequent step in the cause.

EVIDENCE—CONTRACT FOR SALE OF LAND—ABSTRACT.—In an action on a contract for the sale of land, whereby the defendant agreed to convey a fee simple title and to furnish an abstract showing such title, the abstract tendered by the defendant may be admitted in evidence, not as proof of the title to the land, but as tending to show a breach or performance of the condition of the contract requiring an abstract.

PRACTICE—FINDINGS OF FACT—LEGAL CONCLUSIONS.—Findings of fact which merely announce certain legal conclusions deducible from facts not stated, are not sufficient to support a judgment.

Jackson county: L. R. WEBSTER, Judge.

Plaintiff appeals. Reversed.

This is the second appeal in this cause. On the first, the opinion of the court is reported *ante*, 296, to which reference is made for a statement of the pleadings. The cause was re-tried in the court below without a jury and again resulted in a judgment for the defendants, from which

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this appeal was taken. Upon the second trial, the court found the facts as follows:

"On the seventeenth day of April, 1889, the defendants were the owners of certain land near Central Point, Oregon, which they had purchased from John Watson and Phoebe H. Watson, and on which said Watson had a mortgage of fifteen thousand dollars; that the defendants were anxious to sell said land, or a portion of it, to pay said mortgage debt and stop interest; that on said April 17th, defendants entered into an agreement with the plaintiff for the sale of two hundred and fifty acres of said land for ten thousand dollars, which agreement was reduced to writing and attached to the complaint in this action; that the plaintiff paid to the defendants the sum of five hundred dollars mentioned in the agreement on the same day the agreement was made; that within a few days thereafter, the defendant had the two hundred and fifty acres of land mentioned in the agreement, surveyed, and employed J. H. Whitman to make an abstract of title for the plaintiff; and as soon as the abstract was finished, they delivered it to the plaintiff or his attorney; that after some controversy had arisen between said parties in reference to the growing crop, the plaintiff refused to accept the land or to complete the payments, alleging as a reason for such refusal that the title was not good; that on the twenty-ninth day of April, 1889, the defendants with their wives executed a deed of the said two hundred and fifty acres of land with covenants of warranty in due form; and in two or three days after the execution thereof, they tendered the deed to the plaintiff and requested him to accept the land and pay for the same according to said agreement; but plaintiff refused to do so, stating that he could not accept the deed until they made the title good, and he has refused ever since to accept the property or pay for it; that there is a chain of conveyances for said land from the government down to the defendants, and the title

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is good; that the abstract furnished by defendants to plaintiff does not show any legal defects or incumbrances, and there are none in fact. The court therefore finds as a conclusion of law that the plaintiff is not entitled to recover in this action, but that defendants are entitled to recover costs. It is, therefore, considered and adjudged that the defendants do have and recover from plaintiff their costs and disbursements in this action."

H. K. Hanna, for Appellant.

Wm. M. Colvig, for Respondent.

STRAHAN, C. J.—Upon a second appeal, the opinion of the court upon the former appeal, so far as the same facts appear, becomes the law of the case and governs and controls the parties and the court in every subsequent step in the cause. (*Powell v. D. S. & G. R. R. Co.* 14 Or. 22; *Bloomfield v. Buchanan*, 14 Or. 181; *Budd v. Multnomah St. Ry. Co.* 15 Or. 404; *Thompson v. Hawley*, 16 Or. 251.) When this case was formerly before us, the court, per LORD, J., said: "The plaintiff was not endeavoring to show that the abstract conveyed title, but that the abstract of such title furnished the plaintiff by the defendants did not exhibit the good title free from incumbrances that the defendants had agreed to convey. His position, in substance and effect, was that the defendants had agreed by their contract to assure him a good title, and to furnish him an abstract thereof from which its validity and marketable quality might be ascertained and determined; but that the abstract furnished him by them for that purpose, and which the plaintiff offered in evidence, and the court rejected, showed that the title was defective, or not such as would be in accordance with the terms of such contract." Further on, in commenting on the contract, the court observes: "The object of the abstract is plain. It is to enable the purchaser or his counsel to pass readily on the validity of the title." Finally the court placed a construction upon the

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contract, then as now before the court, as follows: "In the case at bar, the contract is written, and the defendants agree to convey a good title free from all incumbrances whatsoever, and to furnish an abstract of such title. What was the object of this abstract? Plainly to enable the plaintiff and his counsel to determine readily on the sufficiency of the title agreed to be conveyed by the contract—in a word, an abstract which would disclose such evidence of title as would show the title free from all incumbrances whatsoever, and defeat any action to recover the land. * * * When, therefore, the abstract was offered in evidence, it was not for the purpose of proving title by the abstract, but of showing that the abstract furnished did not disclose evidence of such title as the defendants had agreed to convey." Words could not be plainer. The defendants had agreed to convey a fee simple title, and to furnish an abstract showing such title. This is the construction placed upon the contract on the former appeal, and cannot now be departed from. In such case the furnishing of such abstract is a condition precedent, and, to bind the other party, must be complied with. (1 Warvelle, Vend. 292.)

The seventh finding recites that the title is good, and the eighth, that the abstract furnished to plaintiff does not show any legal defects or incumbrances, and there are none in fact. These are not findings of fact but naked legal conclusions. The court cannot deduce from them any legal consequences, because they are in themselves legal conclusions. What deeds there are in the chain of title, and their form and manner of execution, are questions of fact; whether or not they vest in the defendants a good title, is a question of law. So, what was contained in the abstract, is a question of fact; whether those facts showed any legal defects or incumbrances, are questions of law. These principles are so elementary that they need no citation of authorities to fortify them. From the record before

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us it is impossible to determine on what legal theory the court below proceeded in the trial; but it is manifest that proper attention was not given to the former opinion of this court in this cause.

For that reason, and because the findings of fact are entirely defective and insufficient to justify the judgment rendered, the same must be reversed and the cause remanded for a new trial.

[Filed April 30, 1892.]

TEMPERANCE HOUSE v. HANFORD FOWLE.

HUSBAND AND WIFE—CONTRACTUAL RELATION—DOWER AND CURTESY.—A husband and wife cannot contract with each other concerning the possible estate of dower or curtesy either may have in the lands of the other by virtue of their marriage.

DOWER—EXECUTION SALE—ADMINISTRATION.—A wife's right to dower is not affected by an execution, or administrator's, sale of her husband's land.

JUDICIAL SALES—CAVEAT EMPTOR—ESTOPPEL.—All judicial sales in this state are subject to the doctrine of *caveat emptor*, and do not operate as estoppels in favor of a purchaser and against one having an adverse interest in the land sold, unless the latter, to induce the purchaser to buy, made some representation against such interest upon which the purchaser had a right to, and did rely.

SUBROGATION—SATISFACTION OF MORTGAGE—DOWER ESTATE—ADMINISTRATOR'S SALE—CASE IN JUDGMENT.—The facts in this case are examined, and it is *held*, that the defendant having purchased the land in question at an administrator's sale, and the money paid by him having been applied to the satisfaction of a mortgage on the land in which the plaintiff's dower, together with the fee, was charged as security for the payment of her deceased husband's debt, the defendant should be subrogated to the rights of the mortgagee, as against the dower estate.

Polk county: R. P. BOISE, Judge.

Defendant appeals. Modified.

The plaintiff alleges in her complaint that she is the owner for her lifetime of, and a tenant in common with the defendant in the real property in controversy; that the defendant owns the said real property in fee simple, subject to the life estate of the plaintiff therein; that the plaintiff and defendant are unable to agree as to a division of the

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29*	800
36*	534
22	308
29	114
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37	608
22	308
41	878

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above described property, and prays that the court determine the respective rights of the parties and partition the property according to their respective interests.

The answer, after denying each allegation of the complaint, alleged a further defense as follows: That on or about the first day of October, 1887, he became the purchaser of the lands described in plaintiff's complaint; that said lands belonged to the estate of R. M. Montgomery, who died at Corvallis, Benton county; Oregon, on the third day of April, 1886; that said estate was administered upon in said county of Benton by S. L. Shedd, and said lands were sold by order of the county court of said county of Benton, in the state of Oregon, to pay a balance of one thousand eight hundred dollars, then due on a mortgage on said lands, and for other purposes, and that said lands were ordered to be sold by said county court at Dallas, on the first day of October, 1887, and were bid off by this defendant at said sale for the sum of three thousand five hundred and five dollars, which bid was accepted, and the lands struck off to him by the said administrator; that said lands were advertised and sold in a body without any reservation of dower or other interest in said lands; that the defendant observed the utmost caution, and, before the sale, saw the plaintiff and informed her that he intended to bid on said lands at the sale then advertised, if everything was fair and there was a good and perfect title to the same.

The plaintiff informed the defendant that the title was good; and the defendant, learning that she was represented by counsel learned in the law, and that said sale was conducted under the direction of the Benton county court, had the utmost confidence that everything was and would be conducted in the utmost good faith and fairness. Said plaintiff represented to the defendant that said lands were free from all incumbrances, and that the plaintiff did not then or at any time give any intimation that she

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claimed any dower or other interest in said lands. And defendant alleges, that after said lands were bid off, and before the money was paid, he sought another interview for the purpose of ascertaining if there was any obstacle in the way of his acquiring a good and perfect title to said lands and the whole of them, and the plaintiff assured the defendant that his title was good, and at no time gave any intimation that she then claimed or intended to claim any interest or dower therein; and defendant alleges that the plaintiff fully and clearly understood that the defendant was seeking to find out if there was any defect of title or obstacle to his acquiring a full and complete title to said lands and to the whole thereof; and defendant alleges that the plaintiff fraudulently concealed her intention to claim dower therein, and that the defendant was misled thereby.

Defendant alleges that at the time of the purchase of said land in 1887, he was a resident of the state of Iowa, merely sojourning in Oregon, intending to purchase a home if he found one suitable and to be had on fair terms; that he was ignorant of the laws of Oregon in relation to what constituted a title to real property, but that he trusted to the representations of the plaintiff and the fact that it was under the direction of the county court. The defendant alleges that he paid a full consideration for said lands at the time and of the whole thereof; that he would not have paid three thousand five hundred and five dollars, or any other sum, had he known it was subject to dower, and that the plaintiff's claim of dower is a complete surprise to him; that since his purchase he has made lasting and valuable improvements on the buildings on said lands to the value of one hundred dollars,—in clearing lands, fifty dollars, and repairing fences, one hundred and fifty dollars.

On the ninth day of January, 1885, the plaintiff and her then husband, R. M. Montgomery, now deceased, joined in a mortgage on the portion of lands first described in plaintiff's complaint, a copy of which said mortgage is

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annexed to the answer as exhibit A; that plaintiff and her then husband borrowed of one Elizabeth Smith the sum of two thousand five hundred dollars, and secured the same by the mortgage on said land; that said mortgage was duly executed by plaintiff and her said husband, and duly recorded in Polk county, Oregon, and was never foreclosed or paid except in part; that one thousand eight hundred dollars of said mortgage was due and unpaid at the date of said sale, and that said sale was for the purpose of providing funds for the payment of the amount due and unpaid on said mortgage, and to provide for the plaintiff's support and the payment of debts, and the costs of administration; that the mortgage was a lien on said lands, and was paid by said defendant, and that said defendant became thereby subrogated to the rights of said mortgagee, and holds said mortgage against said plaintiff for the payment of said one thousand eight hundred dollars and interest from the date of payment, which amount would be more than half the value of said lands; and that the plaintiff could in no event be entitled to more than the residue of said lands after the payment of one thousand eight hundred dollars and the interest thereon.

The answer then alleges that on the twenty-fourth of March, 1880, the plaintiff, for a valuable consideration, sold and conveyed to her husband, R. M. Montgomery, all her interest and dower in said real property, and that such sale had been adjudged void by the circuit and supreme courts at the suit of the plaintiff. It is then alleged that Montgomery made said purchase in good faith, and that the money which the plaintiff received had never been paid back to him; that though three hundred dollars is the consideration named in said deed, the real consideration was one thousand dollars; that said deed and the acquiescence of the plaintiff in the sale of said lands operated as a fraud on the defendant; that said line of conduct was adapted to deceive and defraud the defendant, and that defendant

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ought to be subrogated to the rights of Montgomery and recover the full compensation for said dower.

The reply denies all the new matter in the answer. The cause was referred, and the evidence taken in writing. At the hearing the court found the equities with the plaintiff and made a decree of partition from which the defendant brought this appeal.

F. A. Chenoweth, for Appellant.

J. J. Daly, for Respondent.

STRAHAN, C. J.—No question as to the sufficiency of the pleadings was made by either party in the court below or in this court, and therefore they will not be further noticed.

It is conceded by the stipulation on file that R. M. Montgomery died seized of the land in controversy; that at the time of his death the plaintiff was his wife, and that he died intestate. The plaintiff is, therefore, entitled to dower in said lands unless some of the matters alleged in the answer defeat it.

A suit between these same parties was before this court involving the same real property, and is reported in 20 Or. 163. In that case the plaintiff sought to recover her dower, and the defense was a deed made by her to her then husband, R. M. Montgomery, in his lifetime, and we held that the statutes of this state enabling husband and wife to contract with each other did not extend to or include estates or interests growing out of the marriage relation; so that the effect of that deed, which is here pleaded and offered in evidence, may be dismissed without further remark.

The next defense relied upon is that the defendant purchased said real estate at a sale made by the administrator of R. M. Montgomery, deceased, by order of the county court of Benton county, for the payment of the debts of said deceased. No doubt it is competent for the legislature to provide that at such sales the widow's dower shall also

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pass to the purchaser, and that she may receive in money such proportion of the proceeds of the sale as would adequately represent her interest in the land; but it has not done so in this state, and therefore authorities under statutes differing from our own on that subject could have no application. The construction of our statute authorizing sales by administrators to pay debts of the deceased, has been, ever since its enactment, that such sales did not affect the widow's dower. Nor does an execution sale of the husband's lands, whether made while he is living or after his death, transfer to the purchaser the wife's dower, whether inchoate or otherwise.

The defendant's next contention is, that under the particular facts of this case the plaintiff is estopped from claiming her dower. The facts relied upon to create the estoppel are fully set out in the defendant's answer, but we think they are entirely insufficient. It may be conceded, and no doubt is true, that the defendant acted in the most perfect good faith. There is nothing shown indicating bad faith on either side. The defendant was chargeable with notice of what the statutes contain and of the nature of the title he would acquire at such sale. In addition to this, the rule of *caveat emptor* applies to all judicial sales in this state. It was the defendant's privilege and his duty to investigate the title before the sale, and for that purpose to employ such assistance as he might deem necessary; but he did not resort to the usual methods to ascertain the state of the title. An unlearned woman unacquainted with the forms of conveyancing or the methods of business, could not be regarded as a safe guide or source of information from whom the true state of the title could be learned. It will be noticed that the defendant did not ask the plaintiff at either of the conversations he had with her whether she had or claimed any interest in the land as dower or otherwise. What she told him was that the title was good. That statement was literally true,

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and it is not equivalent to the statement that she had no dower in the land, and that if he would purchase at the sale he would acquire a fee simple title free from all incumbrances. It does not anywhere appear that the defendant relied upon the statements or representations of the plaintiff, and was thereby induced to make the purchase. What the defendant did rely upon was that he ascertained that the plaintiff was represented by counsel learned in the law, and that said sale was conducted under the direction of the county court. These facts induced the defendant to believe that everything was and would be conducted in the utmost good faith and fairness. The principles of the law of estoppel, sought to be applied to this case, are too elementary to require anything more than a reference. (2 Herman, Estoppel, § 960.)

But the defendant contends that, inasmuch as there was a mortgage on the land at the time of the sale by the administrator for about one thousand eight hundred dollars and interest, and that a part of the purchase money paid by the defendant to the administrator was used by him to pay off the mortgage, the defendant ought to be subrogated to the rights of the mortgagee. If that were so, it is not perceived how it could be available as a defense in this case. The code expressly authorizes lien holders to be made defendants in partition suits except those who have liens by judgment or decree. (Code, § 425.) But on what ground can the defendant claim to be subrogated? He was not a party interested in the property affected by the mortgage, and did not in fact pay off the mortgage. What he did was to pay to the administrator conducting the sale the amount of his bid, and the administrator applied the money, or so much as was necessary, in payment of the mortgage. Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers, or of one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a

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purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a coöbligor or surety who has paid the debt which ought, in whole or in part, to have been met by another; or of an heir who has paid the debts of the succession; or of one who has paid his own debt, the burden of which has for a valuable consideration been assumed by another. (Sheldon, Subr. § 3.)

The facts of this case do not bring it within this authority, or any adjudged case we have been able to find. When a purchaser extinguishes an incumbrance upon an estate which he has purchased, he may be subrogated; but the defendant did not purchase the plaintiff's dower. It was not sold nor could it be sold in that proceeding. It was the estate of the intestate which was sold to pay his debts, and the money which was received at the sale was applied for that purpose and no other. When the debt which the intestate owed was paid by the administrator, as a necessary consequence it released the plaintiff's dower from the mortgage. The payment of that debt and the release of the plaintiff's interest was a duty which the intestate owed to her in his lifetime, and the same duty devolved on his administrator by his death. Besides, it cannot be denied that the plaintiff's equity to have the proceeds of that sale applied in exoneration of her property covered by the mortgage is as strong as the defendant's claim to keep the lien alive for his benefit. If the wife had been indebted, or if her interest in the land had been sold with the deceased husband's interest, there would have been more foundation for the appellant's contention. But in addition to this, if the sale at which the defendant purchased had been upon a decree of foreclosure, which would have carried the plaintiff's interest in the land as she was a party to the mortgage, still she would have had her dower in the purchase money, to be ascertained and paid to her after paying off the mortgage. (*Buller v. Smith*, 20 Or. 126.) It may be conceded that subrogation is founded on the prin-

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ciples of equity and benevolence (*Webster and Goldsmith's Appeal*, 86 Pa. St. 409), but to render its application practical, the claim must have substantial equity growing out of the nature of the transaction itself, and it must not work a wrong or injury to another. (*Erb's Appeal*, 2 P. & W. 296.) For these reasons I think the decree appealed from ought to be affirmed. But my associates are of the opinion that under the peculiar facts of this case, which are unnecessary to detail as disclosed by this record, the defendant has brought himself within the doctrine of equitable subrogation, and should be subrogated to the rights of the mortgagee, whose mortgage was an incumbrance on plaintiff's dower, and which was paid with the money of defendant.

It follows, therefore, that the decree of the court below must be modified, and a decree entered in accordance with the opinion of the majority of this court.

[Filed April 30, 1892.]

J. M. SEARS v. L. B. MARTIN ET AL.

EQUITY—EQUITABLE COUNTERCLAIM—LEGAL DEFENSES.—Matters of purely legal cognizance in no way connected with the suit, and not arising out of the transaction upon which the plaintiff bases his claim for relief, cannot be pleaded as counterclaims in a suit in equity.

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Polk county: R. P. BOISE, Judge.

Plaintiff appeals. Reversed.

Daly, Sibley & Eakin, for Appellant.

N. L. Butler, for Respondents.

BEAN, J.—This is a suit to foreclose a mortgage. In substance, the complaint avers that on November 1, 1890, the defendant L. B. Martin made his promissory note and mortgage to plaintiff for one thousand eight hundred dollars, due one year after date; that the mortgage was duly recorded, and that no payments have been made thereon.

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By his answer, the defendant admits the execution and delivery of the note and mortgage as alleged, and by way of counterclaim thereto, avers: "That plaintiff is indebted to him in the full sum of fifty dollars and eleven cents for lumber sold and delivered to plaintiff by defendant at plaintiff's special instance and request in 1889; that plaintiff has failed, neglected, and refused to pay the same or any part thereof, although often demanded; that said sum of fifty dollars and eleven cents is now due and owing from plaintiff to defendant. For a further defense herein, and by way of counterclaim, defendant alleges that plaintiff is indebted to him in the sum of sixty-two dollars for lumber sold and delivered to him by defendant at his special instance and request in the year 1890; that no part thereof has been paid, though often demanded; that there is now due and owing thereon to the defendant from plaintiff the sum of sixty-two dollars. For further and separate answer and defense, and by way of counterclaim herein, defendant alleges that during the year 1890, said plaintiff was the agent of this defendant, and as such was engaged in the collection of a large number of accounts due this defendant from a number of persons for lumber; that for and on behalf of this defendant, plaintiff collected and received on said accounts, as such agent and employé, from said divers persons, sums amounting in the whole to the sum of two thousand one hundred and ninety-two dollars and forty-one cents, no part of which has been paid to this defendant, except the sum of one thousand and fifty-five dollars and seventy-five cents; that defendant has frequently demanded of said plaintiff the payment of the sum of one thousand and twenty-four dollars and fifty-five cents, the balance collected by plaintiff; that he has not paid the said sum or any part thereof; that there is due and owing this defendant from said plaintiff the said sum of one thousand and twenty-four dollars and fifty-five cents."

Points decided.

To each of these counterclaims plaintiff demurred, for the reason that they constitute no defense and cannot be pleaded as counterclaims in this suit. This demurrer, being overruled, plaintiff refused to plead further, and judgment going against him, he brings this appeal. The demurrer should have been sustained. The counterclaim, in a suit in equity, under the practice in this state, must be "one upon which a suit might be maintained by the defendant against the plaintiff in the suit," or one arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or one in some way connected with the subject of the suit. (Code, § 393.) The matters here pleaded are of purely legal cognizance, in no way connected with the subject of the suit, or arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, and therefore do not come within the provision of the statute governing counterclaims in equity. It was so held in *Burrage v. B. G. & Q. M. Co.* 12 Or. 169, and that case is decisive of the question here.

The decree is therefore reversed, and the cause remanded with direction to sustain the demurrer.

[Filed April 30, 1892.]

IVA TEMPLETON v. LINN COUNTY.

PER STRAHAN, C. J.; BEAN, J., concurring:

COMMON LAW—COUNTIES—DEFECTS IN HIGHWAY.—At common law, a county was not liable for an injury resulting from a defect in one of its highways, or roads.

CONSTITUTIONAL LAW—TERRITORIAL STATUTE—REMEDY AGAINST COUNTIES.—

The repeal of the territorial statute making counties liable in actions at law for injuries to the rights of persons arising from acts or omissions of such counties, is not in conflict with section 10 of article 1 of the state constitution, which provides that every man shall have a remedy by due course of law for injury done him in person, property, or reputation.

PER LORD, J., dissenting:

COUNTIES—IMPLIED LIABILITY—COMMON LAW REMEDY.—When the legislature by statutory provision organizes a county into a body politic and

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corporate, with power to contract and be contracted with, to sue and be sued, and devolves on it the duty to keep in repair the highways within its jurisdiction, and provides it with the means of enforcing the performance of this duty, there necessarily results, for the breach or non-performance of this duty, a liability against the county, for which the common law will furnish a remedy whether one is expressly provided by statute or not.

CONSTITUTIONAL LAW—FORMER REMEDIES—LEGISLATIVE POWER.—The provision of the state constitution, to the effect that every man shall have a remedy by due course of law for injury done him in person, property, or reputation, places it beyond the power of the legislature to take away remedies as they existed when the constitution was adopted.

Linn county: R. P. BOISE, Judge.

Plaintiff appeals. Affirmed.

STRAHAN, C. J.—The proposition, that at common law a county was not liable for an injury resulting from a defect in one of its highways or roads, is established by an array of authorities which cannot be questioned. (*White v. Comrs.* 90 N. C. 437; 47 Am. Rep. 534; *Doadall v. Olmstead Co.* 30 Minn. 96; 44 Am. Rep. 185; *Wood v. Tipton Co.* 7 Bax. 112; 32 Am. Rep. 561; *Brabham v. Supervisors*, 54 Miss. 363; 28 Am. Rep. 352; *White v. Bond Co.* 58 Ill. 297; 11 Am. Rep. 65; *Downing v. Mason Co.* 87 Ky. 208; 12 Am. St. Rep. 473; *Reardon v. St. Louis Co.* 36 Mo. 555; *Swineford v. Franklin Co.* 73 Mo. 279; *Clark v. Adair Co.* 79 Mo. 536; *Granger v. Pulaski Co.* 26 Ark. 37; *Barnett v. Contra Costa Co.* 67 Cal. 77; *Scales v. Ordmary*, 41 Ga. 225; *Hedges v. Madison Co.* 6 Ill. 567; *Marion County v. Riggs*, 24 Kan. 255; *Watkins v. County Ct.* 30 W. Va. 657; *Manuel v. Board of Comrs.* 98 N. C. 9; *Fry v. Albemarle Co.* 86 Va. 195; 19 Am. St. Rep. 879; *Gilman v. County*, 8 Cal. 52; 68 Am. Dec. 290; *Woods v. Colfax Co.* 10 Neb. 552; *Monroe Co. v. Flynt*, 80 Ga. 489; *Board of Comrs. v. Mighels*, 7 Ohio St. 109; *Freeholder v. Strader*, 18 N. J. L. 108; 35 Am. Dec. 530; *Cooley v. Freeholders*, 27 N. J. L. 415; *Pray v. Jersey City*, 32 N. J. L. 394; *Young v. Comrs.* 2 Nott & McC. 537; *Ensign v. Supervisors*, 25 Hun, 20; *Bartlett v. Crozier*, 17 Johns. 449; 8 Am. Dec. 428; *Cooley's Const. Lim.* 3 ed. 247, 6 ed. 301; *Dill. Mun. Corp.*

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§§ 996, 997, 999; *Barbour Co. v. Horn*, 48 Ala. 566; *Covington Co. v. Kinney*, 45 Ala. 176; *Rankin v. Buckman*, 9 Or. 253; *Sheridan v. Salem*, 14 Or. 328; *Ford v. Umatilla Co.* 15 Or. 313; *Grant Co. v. Lake Co.* 17 Or. 453; *State ex. rel. v. Comrs.* 11 Ohio St. 183; *Morey v. Newfane*, 8 Barb. 645; *Lorillard v. Monroe*, 11 N. Y. 392; 62 Am. Dec. 120; *Smith v. Board*, 46 Fed. Rep. 340; *Barnes v. Columbia*, 91 U. S. 540; *Conrad v. Ithaca*, 16 N. Y. 158.) The appellant did not seek to controvert this proposition upon the trial in this court. Her only contention is, that at and before the adoption of the constitution of this state, there was a statute in force in the then territory, enacted by its legislature, creating a liability against any county where any injury might happen to any person through a defective road or bridge, where such road or bridge was under the control of the county court or board of county commissioners of such county, and that by section 10, article 1, of the constitution, the legislature of the state was disabled from repealing said territorial statute, without enacting another which would be a substantial equivalent for the law as it then stood upon that subject. The provision of the constitution relied upon is as follows: "No court shall be secret, but justice shall be administered openly and without purchase, completely and without delay; and every man shall have remedy by due course of law for injury done him in person, property, or reputation."

Section 347 of the code, as originally enacted, is not materially variant from the law as it stood prior to the adoption of the constitution, and is as follows: "An action may be maintained against a county or other of the public corporations mentioned or described in section 346, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff, arising from some act or omission of such county or other public corporation." In 1887 this section was amended by omitting the words, "or for an injury to the rights of the plaintiff, arising from some act or omission of such county or other public corporation," and by the addition

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of the words, "and not otherwise," after the word "authority," in said section. The liability created against a county by this statute, as it existed prior to the amendment in 1887, was recognized and enforced in *McCalla v. Multnomah County*, 3 Or. 424, and the rule there stated continued to be recognized until the amendment. This is the first case arising under the statute as amended that has reached this court. There being no common law liability, unless the statute has created a liability, there is none; and the statute having been repealed, there is none under the statute, if it were competent for the legislature to repeal it. It must be conceded that the right to repeal existed unless the legislature was prohibited or restrained from repealing it by article 1, section 10, of the constitution. The words, "and every man shall have remedy by due course of law for injury done him in person, property, or reputation," are claimed to operate as a guaranty in favor of all persons who might be injured by a county's neglect, that the legislature should never so change the statute as to destroy the liability of such county. In other words the constitution found a certain liability created by statute resting upon the several counties, and tied the hands of the legislature so that such liability should endure as long as the constitution shall remain in force. As a proposition of constitutional law, this contention seems startling and although the constitutions of many of the states of this union contain substantially the same provision as section 10, *supra*, no judicial authority was cited upon the argument in support of it, and I think it may be safely assumed that none exists.

The repeal of the statute creating the liability of a county for negligence, is not the only way that liability might be destroyed. It is within the power of the legislature to repeal the act creating a county, and with such repeal a liability would be as effectually cancelled and destroyed as if the county had never existed. Says the supreme court of the United States, in *Laramie County v. Albany County*, 92 U.S. 307: "Corporations of this kind are properly denomi-

nated public corporations, for the reason they are parts of the machinery employed in carrying on the affairs of the state; and it is well settled law that the charters under which corporations are created, may be changed, modified, or repealed, as the exigencies of the public welfare may demand." And the plenary power of the legislature over such corporations was fully recognized by this court in *Morrow Co. v. Hendryx*, 14 Or. 397. It was argued upon the trial that the act making counties liable for the neglect of those who may be entrusted with the administration of their affairs for the time being, was in the nature of a remedy, and for that reason it was placed beyond the power of the legislature to repeal it. A remedy for what? If this statute creates a remedy, where is the law that creates the liability? We have seen that it is not the common law, and there was no other statute on the subject. So that to maintain the doctrine claimed by the appellant, it would have to be held that this statute performed the double office of creating the liability against the county, and also of furnishing a remedy whereby the liability may be enforced, and these by the same words of the act. A process of reasoning which leads to such consequences must be fallacious.

In this case the statute making the county liable was repealed before the alleged injury. At the time of the repeal the plaintiff had no cause of action against Linn county, and her sole cause of complaint is that the repeal of the statute, before the injury, cut off a cause of action which she otherwise would have had against the county. If the plaintiff's rights had accrued before the repeal of the statute, there would have been more reason for her contention, but it would not have been well founded in that case; but when the repeal of the statute did not in any manner affect her at the time, it is difficult to see how her misfortunes, happening after its repeal, can furnish her any grounds of complaint. In a legal sense there can be no liability for negligence where the defendant owed the

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plaintiff no duty; and inasmuch as the duty which a county owed was created by statute only, its repeal destroyed the only foundation upon which an action for negligence could rest.

It was insisted upon the argument that section 10, *supra*, was in the nature of a guaranty to the citizens of the state that some rights were secured to them which are placed beyond the power of legislation, and that it was the duty of the court to define those rights. The time allowed for the consideration of this subject is too brief to allow an exhaustive examination of it; besides, it is never safe for a court to undertake to decide any more than the exact question before it. In addition to this, on the principle of inclusion and exclusion, the court will be better able to determine the effect of this provision of the constitution in each particular case as it shall arise. I think it may be safely said, that without the existence of a right, a party is entitled to no remedy, and the constitution does not purport to guarantee any. The rights of a party may be violated, and for such violation such party must have a remedy. What are these rights? Vested rights undoubtedly. Said Judge COOLEY: "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. When it springs from contracts, or from the principles of the common law, it is not competent for the legislature to take it away; and every man is entitled to a certain remedy in the law for all wrongs against his person or his property, and cannot be compelled to buy justice, or to submit to conditions not imposed upon his fellows as a means of obtaining it." Vested rights are placed under constitutional protection, and cannot be destroyed by legislation. Not so with those expectancies and possibilities in which the party has no present interest. Take the statutes of descent, by way of illustration. A man's heirs have no vested interest in that statute, though, if left unre-

pealed until his death, they would inherit his property; but the legislature might interfere in the mean time and repeal the law altogether, or by a new act change the course of descent, and they could have no cause of complaint. Under a constitutional provision in all respects similar to our own, it was held that there is no vested right in the law generally, nor in legal remedies, and it is competent for the legislature to make changes in these so long as they do not affect the obligation of contracts. (*Edwards v. Johnson*, 105 Ind. 594; *Bryson v. McCreary*, 102 Ind. 1.)

In *Oriental Bank v. Freese*, 18 Me. 109; 26 Am. Dec. 701, it was held that the legislature has power to take away by statute what is given by statute except vested rights. So in *Fire Depart. v. Ogden*, 59 How. Pr. 21, it was held that where a penalty has been imposed by law, the legislature has power to repeal it entirely, or to limit the causes in which it is recoverable, even though an action has been brought for its recovery. And in *Welch v. Wadsworth*, 30 Conn. 149; 79 Am. Dec. 236, it was held that by the repeal of the penal statute, all penalties fall even if given to individuals and suit has been brought and is pending for them. So also in *Bank v. State*, 12 Ga. 475, it was held that an informer who commences a *qui tam* action under a penal statute, does not acquire thereby a vested right to the forfeiture; his claim to the penalty is inchoate and cannot be fixed except by judgment; and held further, that no judgment can be rendered on a repealed statute; the repeal prevents the imperfect right from being consummated, and it is competent for the legislature to pass such repealing statute at any time before final judgment; and it matters not whether the whole penalty, when recovered, is given to the public, or the prosecutor, or divided between them. The same doctrine is announced in *Parmelee v. Lawrence*, 44 Ill. 405; *Henschall v. Schmidt*, 50 Mo. 454; *Chaffee v. Aaron*, 62 Miss. 29; *County of Menard v. Kincaid*, 71 Ill. 587; *Musgrove v. Vicksburg etc. R. R. Co.* 50 Miss. 677.

Concurring opinion—BEAN, J.

It must not be overlooked that courts never declare an act of the legislature unconstitutional unless the conflict is manifest and free from all reasonable doubt. This alone ought to be sufficient to save the act of 1887 from that fate.

I regret that a want of time prevents a fuller and more careful review of this most important and interesting subject; but enough has been said to indicate the main reasons on which this opinion is based. That is all that is possible at present.

I think the judgment appealed from should be affirmed.

BEAN, J., concurring.—By the decided weight of authority, a county is not liable for an injury received from a defective highway, unless by statute; while the courts seem equally agreed that such liability exists as against a municipal corporation. The statute of 1854, which gives a remedy against a county for such an injury, also provided that an action might be maintained against a municipal corporation for a similar injury. So that at the adoption of the constitution a person injured by reason of a defective highway had a right of action, both by the common law and by statute, against the municipal corporation having supervision and control thereof; and yet, in *O'Harra v. Portland*, 3 Or. 525, this court held that an act of the legislature exempting the city of Portland from liability for an injury to the person, growing out of the defective condition of any street or sidewalk, was constitutional. And the doctrine of this case was recognized in *Rankin v. Buckman*, 9 Or. 253. If the legislature can constitutionally take away both the common law and statutory right of action against a municipal corporation for an injury received from a defective highway, it certainly can withdraw the statutory remedy against a county. The provision of the constitution under consideration in this case does not seem to have been noticed or considered by the courts in *O'Harra v. Portland*, but the result of that decision

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is fatal to plaintiff's contention here, and I am not prepared to say that such a conclusion, so far at least as the statutory right of action is concerned, is incorrect, and therefore concur in the result reached by the chief justice.

LORD, J., dissenting.—I am unable to concur in the reasoning or conclusion reached in this case. In this state, a county, through the agency of the county court, has entire charge and control of the highways and bridges within its limits, and has devolved upon it the duty to keep them in repair, and the power to raise money by taxation to enable it to perform that duty. In respect to bridges, the county court is directly authorized "to provide for the erection and repairing within the county of public bridges upon any road or highway established by public authority." (Hill's Code, § 870, sub. 4.) Such being the duty and power of the county to keep in repair its bridges, it ought, upon principle, to be held liable to any one for an injury sustained in consequence of its failure to keep a bridge upon the highway in repair. As WORDEN, J., said: "The obligation thus imposed upon the board to cause all bridges in the county to be kept in repair, with ample power to provide means to discharge the obligation, carries with it a corresponding right in every one having occasion, in the usual course of travel, to use the bridges, to have the obligation fulfilled, and the bridges kept in repair. And it seems to us to follow, that where the board negligently suffers such a bridge to be out of repair, whereby a person, in the ordinary use of it, is injured in person or property, without his own fault, he must have an action against the board for damages; otherwise, there will be a wrong without a remedy." (*House v. Commissioners*, 60 Ind. 583; 28 Am. Rep. 657.) While the courts held with a good deal of unanimity that a chartered corporation, with authority to keep in repair its streets and bridges within its limits, and power to raise money by taxation for that purpose, is liable

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in damages for injuries sustained by any one in consequence of neglect to keep them in repair, unless otherwise provided by statute, they have, with almost equal unanimity, denied the application of the same principle of liability to counties for failing to keep in repair the highways and bridges within their limits, when clothed with a like authority over them, and power to provide means to enable them to do so. But the reason given for this distinction, namely, that a liability should attach to municipal corporations, and not to counties, because the former are supposed to accept their charters voluntarily, and the latter to have the duties and obligations imposed upon them involuntarily, has not been satisfactory, but has been the subject of much adverse criticism.

"There is no sound distinction," says Judge THOMPSON, "between the sanction of an obligation voluntarily assumed by a public body and that of an obligation which the legislature, in due exercise of its powers, has imposed upon it." (1 Thomp. Neg. 618.) "If it be granted," says Judge ELLIOTT, "that a public corporation, such as a city, is liable because it is charged with a public duty, and invested with the means to enable it to perform that duty, it is impossible, as it seems to us, for one who proceeds upon principle, to avoid the conclusion that a county charged with a specific duty and provided with the means of enforcing it, is not likewise liable." (Elliott, Rds. & Sts. 41; 2 Dill. Mun. Corp. § 998.)

The leading case, on which the cases exempting counties from liability in this country are based, is *Russell v. The Men of Devon*, 2 T. R. 667. The action was brought by an individual against the inhabitants of the county of Devon for an injury sustained in consequence of a county bridge being out of repair. Two of the inhabitants, for themselves and others of the county, appeared and demurred generally, and there was judgment for the defendants. As showing the reasons given for the judgment, Lord KENYON,

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C. J., said: "But the question here is, whether this body of men, who are sued in the present action, are a corporation or a *qua* corporation, against whom such an action can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the legislature for that purpose. * * * I do not say that the inhabitants of a county or hundred may not be incorporated to some purposes; as if the king were to grant lands to them, rendering rent, like the grant to the good men of the town of Islington. But where an action is brought against a corporation for damages, those damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate; but if the county is to be considered as a corporation, there is no corporation fund out of which satisfaction is to be made."

ASHHURST, J., said: "But there is another general principle of law which is more applicable to this case—that it is better that an individual should sustain an injury than that the public should suffer inconvenience. Now, if this action could be sustained, the public would suffer a great inconvenience; for if damages are recoverable against the county, at all events they must be levied on one or two individuals who have no means whatever of reimbursing themselves; for if they were to bring separate actions against each individual of the county for his proportion, it is better that the plaintiff should be without remedy."

The reasons given for this judgment have no force under the law regulating our counties. The county is a body politic and corporate, and as such may sue and be sued, and ample provision is made for the satisfaction of judgments rendered against the county. As the court said in *Dean v. New Milford*, 5 W. & S. 547, in speaking of *Russell v. The Men of Devon*, *supra*, "the cause was decided for reasons which do not exist in this state. (1) That a county was not a corporation, and (2) that there was no county fund out of which satisfaction could be made. * * * The

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inference is by no means unreasonable that, had not these reasons existed, the judgment would have been different." Judge THOMPSON says: "The ground on which Lord Kenyon placed his judgment in *Russell v. Men of Devon*, that counties have no corporate fund, and that judgments for damages against them would have to be levied off the property of any one or more of the individual inhabitants, is not sound when applied to counties in Missouri, Illinois, and other western states. The counties are political bodies, having a common administrative board, elected by the voters of the county, by which the business of the county is transacted. Through this board the county contracts, and is contracted with, sues and is sued. Many counties issue negotiable securities in large amounts. Their administrative boards possess a limited power of taxation for county purposes. In these respects no substantial difference is perceived to exist between them and chartered municipal corporations." (1 Thomp. Neg. 618.) It must be confessed, then, as Judge DILLON says, "it is not easy to find a legal basis for the distinction between cities and counties in respect to the duty to keep the streets and highways under their respective jurisdictions in repair, whereby the former are held to an implied civil liability for damages caused by the neglect of this duty, and the latter are held not to be thus liable." (2 Dill. Mun. Corp. 998.)

The truth is, there is no basis upon which to rest the distinction, for the reason that none exists. That eminent jurist, BLACK, C. J., says: "Every highway or thoroughfare which the public has the right to use, must be kept by somebody, in such order that it can be safely used; and if any serious injury happen to an individual in consequence of its bad condition, those who are bound to repair must answer in damages." After citing several authorities, he proceeds: "I have cited these several cases to show that a party bound to repair, whether it be an individual, a private corporation, a township, a district, or city, must perform

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the duty, or pay, in an action on the case, for all injuries to persons and property which may be caused by the omission." (*Erie City v. Schwingle*, 22 Pa. St. 384; 60 Am. Dec. 87.)

So that, in my view, it is immaterial whether a right of action is given by statute or not, when the legislature, by statutory provision, creates a county into a body politic and corporate, giving it the power to contract, and to be contracted with, to sue and to be sued, and devolves upon it the duty to keep in repair the highways and bridges within its jurisdiction, and provides it with the means of enforcing the performance of this duty, the effect of such legislation is to create a liability against the county for a breach or non-performance of such duty, for which the common law will furnish a remedy. In other words, out of the obligation imposed, by such statutory provisions, there arises against the county a liability for an injury when it fails to keep in repair its highways and bridges, to be enforced by action as in like cases. As touching this identical question, I agree with Mr. Justice DEADY, when he said: "Upon this state of the obligation and power of the county, it is liable, in my judgment, for an injury sustained by any one in consequence of its failure to keep a highway or bridge thereon in reasonable repair; and, on principle, the common law would furnish a remedy therefor as in the case of an incorporated town." (*Eastman v. Clackamas Co.* 32 Fed. Rep. 30.)

In addition to this, there are other considerations of a constitutional character that bear upon the right to maintain this action.

By section 4, Laws, 1854, 168, an action was authorized to be brought against any county in the then territory, either upon a contract, or "for an injury to the rights of the plaintiff, arising from some act or omission" of said county, which was continued in force after the adoption of the constitution by section 7, article 18, of the constitution, which provides "that all laws in force in the territory of Oregon when this constitution takes effect, and consistent

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therewith, shall continue in force until altered or repealed." And by section 347 of the code of civil procedure, which took effect June 1, 1863, it was reenacted and continued with some verbal alterations. On February 21, 1887, section 347, *supra*, was amended limiting the right to maintain an action against a county to cases arising on contract, and not otherwise. (Hill's Code, § 350.) It is provided by section 10, article 1, of the constitution, as follows: "No court shall be secret, but justice shall be administered openly and without delay; and every man shall have remedy by due course of law for an injury done him in person, property, or reputation."

In view of this state of the law, and this constitutional provision, guaranteeing to every man a remedy by due course of law for an injury done him in his person or property, the right of the plaintiff to maintain this action, or to have a remedy for the injury sustained by the negligence of the defendant, is a vested right which the legislature cannot take away; and, as a consequence, the amendment to section 347, *supra*, denying such remedy, is null and void. As it is not doubted but that this constitutional provision preserved such remedies as the common law afforded, it is difficult to understand, in view of the remedy afforded by the common law against incorporated towns or cities, why it should not preserve a remedy against a county for an injury arising from its neglect, when the statute of the territory, for years before, and at the time of the adoption of constitution, gave a right of action—a remedy—against a county for an injury caused by its wrongful act or omission.

If we admit that the common law did not furnish any remedy against a county, then this territorial statute was enacted to afford a remedy for an injury for which it did not provide, and thus obviate its defect and injustice. Such, then, being the law at and before the formation of the constitution, the provision that "every man shall have remedy by due course of law for an injury done

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him in person or property," would preserve to him a remedy or right to maintain an action against a county for an injury sustained by its negligence. As observed by Mr. Justice DEADY: "Whatever injury the law, as it then stood, took cognizance of and furnished a remedy for, every man shall continue to have a remedy for by due course of law. When this constitution was formed and adopted, it was and had been the law of the land from comparatively an early day, that a person should have an action for damages against a county for an injury caused by its act or omission. If this then known and accustomed remedy can be taken away in the face of this constitutional provision, what other may not? Can the legislature, in some spasm of novel opinion, take away every man's remedy for slander, assault and battery, or the recovery of a debt, and if it cannot do so in such cases, why can it in this?" (*Eastman v. Clackamas Co. supra.*) In construing a similar provision under the constitution of Missouri, it was held by the supreme court of that state, that the provision meant that a remedy should be afforded for such wrongs as are recognized by the law of the land. (*Landis v. Campbell*, 79 Mo. 433; 49 Am. Rep. 239.) By the law of the land, is meant the general public law of the state, binding alike upon all the members of the community. The law of the land, at and before the adoption of the constitution, provided a remedy against a county for an injury to any one arising from its wrongful act or omission; and for such injuries or wrongs, as the law of the land recognized and provided a remedy, when the constitution was formed and adopted, the courts must afford a remedy under the guarantee of this constitutional provision. In the interpretation of the provisions of a constitution, contemporaneous construction is always resorted to to throw light upon them and explain their purpose and meaning. What was the law and practice at the time,—what was the wrong the law was designed to remedy,—the framers of the constitution are supposed to have known when they formed it, and

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the people when they ratified and adopted it. The case of *Tribou v. Stroubridge*, 7 Or. 156, illustrates the application of this principle of interpretation, and by analogy is decisive of the contention here involved. In that case, the validity of the statute authorizing the court in actions at law to refer causes which involve the examination of long accounts, whether the parties assent or not, was questioned upon the ground that the statute violated section 17 of article 1 of the constitution, which provides that "in all civil cases the right of trial by jury shall remain inviolate." "This language of the constitution," said BOISE, J., "indicates that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practice of the courts at the time of the adoption of the constitution. So that, in order to ascertain whether such right exists in this case, we must look into the history of our laws and jurisprudence at and before the adoption of the state constitution. The statute in question was passed by the legislature of the late territory of Oregon in 1854, and has been copied into the present code, so that this statute has been in force since that time, and was the law of the territory at the time the constitution was adopted, and therefore does not abridge the right of trial by jury as it existed when we became a state. Under this statute cases like this have been referred and tried by a referee without question as to the authority of the court to order the reference, for a quarter of a century; and was there doubt as to the constitutionality of this statute, it would, under the circumstances and the sanction of long usage, have to be solved in favor of the statute." Construed in the light of such legislative expositions, we are able to discover and understand the meaning of the provisions of the constitution, and the rights and remedies such provisions were intended to secure and preserve against legislative deprivations. As the territorial statute giving to every man a remedy against the county for neglect to

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keep in repair the highways and bridges within its limits was in force before and at the time of the adoption of the constitution, when the framers of the constitution inserted the provision securing to every man a remedy for an injury done him in person and property, the effect of that provision was to secure to every man, by due course of law, a remedy against a county for a breach of duty to keep in repair its bridges, which the legislature cannot take away. Nor is there anything in the case of *O'Harra v. Portland*, 3 Or. 525, in conflict with this result. There was no attempt by section 127 of the charter to deprive the person injured by a defect in a street, of a remedy. The liability was shifted from the city of Portland to the officer or officers upon whom the duty devolved and out of whose negligence the injury resulted. There was a remedy. Hence, as the case discloses, the point here was not involved, nor could it be raised.

[Filed April 30, 1892.]

CAROLINE McBEE v. WILLIAM McBEE.

DIVORCE—HABITUAL GROSS DRUNKENNESS.—Occasional acts of intoxication are not sufficient to make one an habitual drunkard; there must be the involuntary tendency to become intoxicated as often as the temptation is presented, which comes from fixed habit acquired from frequent and excessive indulgence.

Douglas county: M. L. PIPES, Judge.

Defendant appeals. Reversed.

J. C. Fullerton, for Appellant.

Wm. R. Willis, for Respondent.

LORD, J.—This is a suit in equity brought by the plaintiff against the defendant, her husband, to obtain a divorce. The only cause for divorce alleged in her complaint is habitual gross drunkenness contracted since the marriage and continuing for one year prior to the commencement of this suit. There are other allegations as to the real prop-

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erty owned by the defendant, but to which further reference is unnecessary. The answer of the defendant denies the allegation of habitual gross drunkenness and all other allegations in reference thereto. The cause was referred to a referee, the testimony reduced to writing and reported to the court, whereupon the court made a decree granting a divorce to the plaintiff and awarding her one-third of the real property of the defendant.

The only question in this case is, whether the defendant is an habitual gross drunkard. Our statute provides as a cause for divorce: "Habitual gross drunkenness contracted since marriage and continuing for one year prior to the commencement of the suit." (Hill's Code, § 495, sub. 4.) The testimony of the plaintiff is to the effect that the defendant has drunk to excess and intoxication latterly, when he came to town, which would average twice a month. She says: "He might not get so drunk every time he came to town, but pretty nigh it"; but "he sobered up quick; hardly ever brought liquor home with him, but sometimes he did; during the hop-picking time they had liquor there." When asked whether he had been under the influence of liquor to such an extent for the last two or three years as to disqualify him in any way to perform the work about the farm, she answered: "No; it was mostly when he came to town that he got intoxicated." There is other evidence corroborative of these statements, and other evidence for the defendant in conflict with it. It appears that since their marriage in 1880, they have lived upon his farm, which is some four or five miles from Roseburg; that she had four children by a former marriage, whom he has supported, and that there are now two other children, the fruit of the present marriage. The town of Roseburg is the only place in the vicinity of his farm where liquor is kept for sale. While the plaintiff puts the average of his visits to Roseburg at twice a month, the testimony shows that sometimes he did not go there for an interval of a month, sometimes oftener,

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or once a week; but these visits were not made specially for the purpose of procuring liquor, or of drinking to excess or intoxication. When he had any business which called him to Roseburg, he would generally indulge in intoxicating drinks, and sometimes to excess; and on one occasion he got so drunk as to fall from his wagon, although he gives another version to the affair. There is some testimony of his neighbors to the effect that he is not a drunkard, and does not have the reputation of being one in the community in which he lives. Mr. Josephson and Mr. Simon Caro, both merchants of Roseburg, testify that they have known him for twelve to fifteen years, and that they have traded and done business with him, and met him nearly every time he came to town; that they had never seen him drunk; and that if he had been an habitual drunkard, or had had such a reputation, they would have observed and known it. This testimony is hardly to be classed as merely negative. It is not simply to the effect that they had not seen him in a state of intoxication, but it goes farther and shows that with their opportunities for observing his habits, he could not have got drunk every time he came to town, or been so habituated or confirmed in the habit, without their knowing it.

What constitutes habitual gross drunkenness sufficient to warrant a divorce, has not been defined in any adjudicated case in this state. In other statutes, the language is "habitual drunkenness," or "habitual intemperance," but our statute adds the word gross as if something more were intended or denoted. Bouvier defines an habitual drunkard to be a "person given to inebriety, or the excessive use of intoxicating drinks, who has lost the power or will, by frequent indulgence, to control his appetite for it." "Habitual drunkenness," said HARRISON, J., "or the degree, or the course of intemperance that amounts to it, cannot be exactly defined. We may, however, say in general terms, that one is addicted to habitual drunkenness

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who has a fixed habit of frequently getting drunk, and he may be so addicted, though he may not oftener be drunk than sober, and he may be sober for weeks." (*Brown v. Brown*, 38 Ark. 328.) "Occasional acts of drunkenness do not make one an habitual drunkard. Nor is it necessary that he should be continually in an intoxicated state. A man may be an habitual drunkard and yet be sober for days and weeks together. The rule is, has he a fixed habit of drunkenness." (*Ludwick v. Comw.* 18 Pa. St. 172.) "He is an habitual drunkard," says the court in *Comw. v. Whitney*, 5 Gray, 85, "whose habit is to get drunk; whose inebriety has become habitual." POLAND, J., said: "The fair definition of habitual drunkard as used in the statute, we suppose to be 'one who is in the habit of getting drunk or who commonly or frequently is drunk,' and we do not suppose it necessary to satisfy those terms that a man should be constantly or universally drunk." (*State v. Pratt*, 34 Vt. 323.) It is held in *Magahay v. Magahay*, 35 Mich. 210, that one who has the habit of indulging in intoxicating liquors so firmly fixed that he becomes intoxicated as often as the temptation is presented by his being in the vicinity where liquor is sold, is an habitual drunkard within the meaning of the divorce law. In *Walton v. Walton*, 34 Kas. 195, it is said that a man who drinks to excess may be an habitual drunkard within the meaning of the divorce laws, although there are intervals when he refrains entirely from the use of intoxicating drinks. "But," the court adds, "before he can be regarded as an habitual drunkard, it must appear that he drinks to excess so frequently as to become a fixed practice or habit within him." In *Murphy v. People*, 90 Ill. 59, it was held that a person who is in the habit of getting intoxicated is one who has the involuntary tendency to become intoxicated, which is acquired by frequent repetition. "The charge of habitual intemperance," says HARRISON, J., "evidently can only refer to a persistent habit of becoming intoxicated from the use of

strong drinks, thus rendering his presence in the marital relation disgusting and intolerable." (*Burns v. Burns*, 13 Fla. 376.) And WATKINS, J., defined it thus: "It means the custom or habit of getting drunk; the constant indulgence in such stimulants, as wine, brandy, and whisky, whereby intoxication is produced; not the ordinary use, but the habitual abuse of them. The habit should be actual or confirmed. It may be intermittent. It need not be continuous, or even of daily occurrence." (*Mack v. Handy*, 39 La. An. 497.)

From these definitions, there must be frequent and regular recurrence of excessive indulgence in intoxicating drinks, to constitute an habitual drunkard. It is not necessary that he should drink liquors to excess, and become intoxicated every day, or even every week, but there must be such frequent repetition of excessive indulgence as to engender a fixed habit of drunkenness. Occasional acts of intoxication are not sufficient to make one an habitual drunkard; there must be the involuntary tendency to become intoxicated as often as the temptation is presented, which comes from a fixed habit acquired from frequent and excessive indulgence. The man is reduced to that pitiable condition in which "he either makes no vigorous effort to resist and overcome the habit, or his will has become so enfeebled by the indulgence that resistance is impossible." There is generated in him, by frequent and excessive indulgence, a fixed habit of drunkenness, which he is liable to exhibit at any time when the opportunity is afforded. He is an habitual drunkard because he is commonly or frequently in the habit of getting drunk, although he may not always be so. When a man has reached such a state of demoralization that his inebriety has become habitual, its effect upon his character and conduct is to disqualify him from properly attending to his business, and if he be married; to render his presence in the marriage relation disgusting and intolerable, especially if he

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be an "habitual gross drunkard," as declared by our statute. "The reason why the law makes habitual drunkenness a ground for divorce, is not alone because it disqualifies the husband or wife from attending to business, but, in part, if not mainly, because it renders the person addicted thereto unfit for the duties of the marital relation, and disqualifies such person from properly rearing and caring for the children born of the marriage." (*Richards v. Richards*, 19 Brad. 469.)

In view of these considerations, it does not seem to us that the testimony would justify us in declaring that the defendant is so addicted to the habit of intoxication as to be an habitual drunkard. In all the years there are only a few occasions, according to the version of the testimony against him, when he was grossly drunk, and when his conduct was improper and unbecoming. The testimony does not indicate the confirmed habit of drinking to excess; he only drank when he happened to come to town, which was generally on business, and then not always to excess, and sometimes, the evidence indicates, not at all; or if so, not indicated by his conduct, or demeanor. He seldom carried liquor to his home, and, with the exceptional instances stated, was a sober man in his family and about his home. While we would feel no hesitation in dissolving the marriage contract when one of the parties was addicted to "habitual gross drunkenness," we ought not to lend our aid to effect a separation, especially when there is issue of the marriage, unless fully satisfied by the testimony, viewed as a whole, that the defendant was an habitual gross drunkard.

In view of these considerations, we think the decree must be reversed, the defendant paying all costs and disbursements.

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[Filed April 30, 1892.]

W. E. BAKER v. N. P. PAYNE.

STATUTORY CONSTRUCTION—ATTORNEY-GENERAL—VACANCY IN OFFICE—ELECTION OF SUCCESSOR.—Section 2 of the act of February 21, 1891, creating the office of attorney-general, provided that that officer shall be elected at the general election held in June, 1894; that he shall hold his office for the term of four years, and until his successor is elected and qualified; and that his term shall commence on the same day as that of the secretary of state, as now provided by law. Section 5 of the same act provides that in case of a vacancy in that office, the governor shall appoint a suitable person, who shall hold the office until the next general election, when his successor shall be elected and shall qualify; *held*, that the successor to the person appointed by the governor when the act took effect, must be elected at the general election to be held in June, 1892, that being the next general election occurring after the vacancy in the office happened.

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40	363
22	335
48	291

STRAHAN, C. J., dissents.

Linn county: R. P. BOISE, Judge.

Defendant appeals. Affirmed.

J. K. Weatherford, and *Blackburn & Watson*, for Appellant.

Montanye & Hackleman, and *F. P. Mays*, for Respondent.

George G. Bingham, district attorney.

LORD, J.—This is a proceeding for a mandamus, brought by Wm. E. Baker, who is alleged to be a citizen and voter of Linn county, Oregon, to compel the defendant and appellant, as county clerk of said county, to correct his notices of election for the general election to be held in June, 1892, by naming therein the office of attorney-general for the state of Oregon, to be filled thereat. Upon the presentation of the petition, an order was made by the judge that an alternative writ of mandamus issue, directed to the defendant, commanding him to correct said notices by naming the office of attorney-general of the state of Oregon, to be filled at said general election, or show cause why he has not done so. Upon the return day, the defendant returned said writ with his answer annexed thereto, in which he denied all the material allegations in said peti-

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tion, and for a further and separate defense in substance alleged: That pursuant to the provisions of an act of the legislative assembly of the state of Oregon, entitled, "An act to create the office of attorney-general, provide the duties and fix the compensation," filed in the office of the secretary of state, February 21, 1891, it was made the duty of the governor of the state of Oregon to appoint a suitable person to be attorney-general of the state of Oregon; and that pursuant to the provisions of the act, his excellency, the governor, did on or about the twenty-first day of May, 1891, appoint Geo. E. Chamberlain such attorney-general, and that said appointee did thereupon qualify and enter upon the duties of such office, and that he is now the duly qualified incumbent; that under the provisions of said act, there is to be elected by the qualified electors of the state of Oregon at the general election to be held in June, 1894, and every fourth year thereafter, an attorney-general, who shall hold his office for the term of four years, and until his successor is elected and qualified, and that the term of the office of attorney-general shall commence on the same day as secretary of state, as now provided by law; that such appointee, the present incumbent, as defendant is informed and believes, is entitled to hold his said office until the general election in June, 1894; that for the reasons set out in his answer, and not otherwise, defendant has refused and still refuses to give notice of the election of an attorney-general, and he prays said writ be quashed, etc., and for his costs and disbursements.

The separate answer was demurred to; and the cause coming on for hearing, the court sustained the demurrer, and the defendant refusing to plead or answer further, it was ordered that a peremptory writ issue, directed to the defendant, commanding him to insert in the notices of election for each election precinct in said county that an attorney-general will be voted for and elected at the next

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general election to be held in June, 1892. From this order this appeal has been taken.

The only question to be determined is, whether there is an attorney-general to be elected at the next general election in June, 1892; and the solution of this question involves the construction of sections two and five of an act of the legislative assembly, entitled, "An act to create the office of attorney-general, provide the duties, and fix the compensation." (Laws, 1891, 188.) The second section of said act reads as follows: "There shall be elected by the qualified voters of the state of Oregon, at the general election held in June, 1894, and each fourth year thereafter, an attorney-general, who shall hold his office for the term of four years, and until his successor is elected and qualified; and the term of office of the attorney-general shall commence on the same day as secretary of state, as now provided by law." The provisions of this section relate solely to the election of a person to a full or vacant term of four years in the office of attorney-general; they have no reference to a vacancy in a term, or a fractional part of a term. This becomes manifest when the different provisions of the section are examined and their purpose understood. The section provides that an attorney-general shall be elected in June, 1894, and every four years thereafter, who shall hold his office for four years, and that the term of his office shall commence on the same day as secretary of state. Here, it will be noted, as regards a full or vacant term to be filled by election, the time of his election, the commencement of his term and its duration of four years, is the same as is provided for governor, secretary of state, and treasurer. The evident purpose is to preserve uniformity in the tenure of state offices. As the next four-year or full term of these officers will not commence until the second Monday in January next after their election in June, 1894, it was necessary, if the attorney-general's term was to commence at the same time, and be of the same

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duration, that he should be elected at the same time, namely, in June, 1894. Hence, the section provided that an attorney-general should be elected in June, 1894, for a term of four years, and that his term should commence on the same day as the term of the office of secretary of state. This construction makes operative every part of the section, without affecting the ordinary meaning of its language; and unless it is in conflict with some other section of the act from which it is clear that the law-making power intended otherwise, it must be regarded as the proper construction.

It is, however, in respect to the construction to be given to section 5 of the act that the controversy mainly arises. This section provides: "Upon the approval of this act, and at any time when a vacancy may by any cause occur in the office of attorney-general, the governor shall appoint a suitable person to be attorney-general, who shall hold the office until the next general election, when his successor shall be elected and shall qualify as provided for in this act." In our view, this section relates exclusively to a fractional term, or a vacancy in the term of the office of attorney-general. It is wholly directed to the filling of an hiatus in a term of such office, which may for any cause become vacant, by appointment, and by election, if a general election should intervene before such part of a term expired after the appointment. When the act became a law in February, 1891, the office created by it was vacant; but before there could be an election for a term of four years, as provided by section 2, which was to commence on the second Monday in January, 1895, the commencement of the secretary of state's term of office, there existed a fractional part of a term, extending between these periods, which this section contemplated should be filled in the manner provided therein. This vacancy existing upon the approval of the act creating the office, stands precisely upon the same footing as a vacancy occurring hereafter for

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any cause, such as the death or resignation of an attorney-general, elected for a full term. In either of these cases, the section, as we construe it, is intended to apply to a fractional or unexpired portion of a term.

It remains now to test the application of this construction of the purpose of section 5, and to ascertain if the result it works out is consistent with that section, and not in conflict with section 2. Upon the approval of the act, the governor was authorized by this section to appoint a suitable person to be attorney-general. There was then existing a vacancy in the term of the office of attorney-general extending over a period of more than three years. It was the fractional part of a term; and after an appointment was made to fill it, there intervenes a general election to be held in June, 1892, before such term expires and a new term begins. The section further provides that the suitable person appointed by the governor shall hold the office until the next general election, which, according to the plain meaning of the words, would be the general election to be held in June, 1892. The next general election, especially in view of the fact that our constitution provides that general elections shall be held on the first Monday in June biennially (article 4, section 14,) after the appointment of the present incumbent in 1891, is not the general election held in June, 1894, provided by section 2, but it is the next general election, which is to be held in June, 1892. Nor is this result affected by the concluding words, "when his successor shall be elected and shall qualify as provided for in this act." When his successor shall be elected, refers to the next general election, which precedes when, or at which time, the successor to the person appointed by the governor shall be elected, and shall qualify as provided for in this act, which is by filing his certificate with his oath of office endorsed thereon, etc., as prescribed by section 6 of the act.

To take the whole section and construe it as we understand it with explanations, it would read in this wise:

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“Upon the approval of this act, * * * the governor shall appoint a suitable person to be attorney-general, who shall hold the office until the next general election, when (at which time) his successor (the successor to the person appointed by the governor) shall be elected (at the next general election as provided in this section) and shall qualify as provided for in this act” (which is prescribed by section 6 of the act).

It was contended for the appellant that the words in section 5, “the next general election,” when construed in connection with the words or language which follow, “when his successor shall be elected and qualified as provided for in this act,” referred to the general election held in June, 1894, and not, as the words would seem to import, at the next general election, which is to be held in June, 1892. But the next general election, provided for in this act, when a vacancy exists in a part of a term of such office, is provided by section 5, and not by section 2, as that section relates to the filling of the office of attorney-general by election for a term of four years. It is to vacancies in an unexpired term to which section 5 applies; and if there is such a vacancy, the governor fills it until the next general election, when, if the term has not yet expired, the people fill it at the next general election for such unexpired portion of the term. When there can be no general election intervening between the appointment of the governor and the expiration of the term, the appointment of the governor then fills the unexpired term.

At the argument, by way of illustration, counsel was asked, if an attorney-general should die or resign in a few days after his election in June, 1894, leaving a vacancy in such office to be filled for such unexpired term, whether the person appointed by the governor would hold the office for the whole of such unexpired term or until the next general election, when his successor could be elected to fill the vacancy for the remaining part of the unexpired term.

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His answer was consistent with his argument. He claimed that the appointee of the governor would hold for the remaining part of the term, notwithstanding the next general election would intervene before the expiration of such term. It seems to us to give the words the next general election, in section 5, when such general election intervenes before the general election to be held in June, 1894, the construction contended for, is to violate the plain meaning of the words, the next general election, and to disregard the purpose which the section was designed to accomplish. The golden rule of construction is to give effect to the ordinary meaning of words employed in a statute, unless it be clear that the law-making power intended otherwise. "Every word and clause, if possible, should have assigned to it a meaning, leaving no useless words." (Bishop on Written Law.) Statutes must rest on the words used, "nothing adding thereto, nothing diminishing." (*Leavenworth R. R. Co. v. U. S.* 92 U. S. 751.)

Another contention of counsel was that section 5 should have added or interpolated the words "for offices of a like class, or state officers," so as to make the section read as follows: * * * "Who shall hold the office until the next general election for offices of a like class, or for state officers, when his successor shall be elected and shall qualify as provided for in this act." But this is importing words into the statute not found there to sustain the construction contended for, and to give the statute and the section a particular meaning which they would not bear without them. As PATTERSON, J., said: "I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty." (*Rex v. Barrell*, 12 Ad. & Ell. 468.)

As to the contention in respect to the punctuation of the statute, it is enough to say that the rule is, that courts will, in the construction of statutes, for the purpose of arriving at the real meaning and intention of the law makers, disre-

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gard the punctuation or re-punctuate if need be, to render clear the true meaning of the statute. In *Oushing v. Warrick*, 9 Gray, 382, it was held that "punctuation was not to be regarded in constructing a statute." OAKLEY, J., says: "The courts will re-punctuate if necessary to render the meaning clear." (*Allen v. Russell*, 39 Ohio St. 336; *Gyger's Estate*, 65 Pa. St. 311; *Allbright v. Payne*, 43 Ohio St. 8.)

And, finally, it was claimed that the original bill, as introduced, provided for the first election of attorney-general, "at the first election held after the approval of this act," but that it was so amended as to provide that the election should take place in June, 1894, as now provided by section 2. This it is claimed shows that it was the intention of the legislature that no election of attorney-general should be held until June, 1894, and that the provision in section 5 as to the next general election simply means the general election in June, 1894, until which time the appointee of the governor will hold his office. To our minds, the reason for the change indicates a wholly different purpose. To have made the election of attorney-general to take place "at the first general election held after the approval of the act," would have destroyed the uniformity in the term of this office with other state officers, which was accomplished by making the election for a full term take place in June, 1894. To make the election take place at the first general election after the approval of the act, would have made the election for the term of four years take place in June, 1892, and in such case it would have been impossible to make the term of the office of attorney-general commence on the same day as the term of the office of secretary of state, and brought about the uniformity which is effected by making the election take place in June, 1894. That counsel regarded the object in amending section 2, was to preserve uniformity in state offices, is manifest by the words which he sought to interpolate into section 5. On the other hand, the construction we have

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given to sections 2 and 5, needs no artificial aid or words interpolated to give these sections any other meaning, or any particular meaning, than the words naturally bear. This construction aims to give to every word its ordinary signification, and to every clause a meaning and effect. Under it, as provided by section 2, there will be an attorney-general elected in June, 1894, who will hold his office for a full term of four years, and whose term will commence with that of the secretary of state, thus preserving uniformity in the tenure of state offices. Under it, as section 5 provides, when a vacancy occurs in a term, or there is an unexpired term to fill, the governor will appoint a suitable person, who will hold his office until the next general election, when, if such term is still unexpired, the power reverting to the people, they will fill it by electing his successor for the remaining part of such term. From these considerations, it results that the present incumbent, appointed by the governor, holds his office until the next general election, which is to be held in June, 1892, when his successor, whoever he shall be, will be elected; and when such successor's election shall be officially known and declared, and he shall qualify as prescribed by section 6, the title of the office of attorney-general will be transferred to him, and he will be the attorney-general of the state of Oregon for the balance of such term, or until a new term begins.

There was no error, and the judgment must be affirmed.

STRAHAN, C. J., dissenting.—This proceeding calls for a construction of sections 2 and 5 of the act creating the office of attorney-general, because if the attorney-general is elective at the ensuing June election, notice thereof should be given in like manner as notices are given for the election of other state officers, and it is made the duty of the county clerk to give such notice. If the office of attorney-general is to be filled at the June election, to be

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held in 1892, the judgment of the court below should be affirmed; but if such office is not to be filled by an election until 1894, then the judgment appealed from should be reversed and the writ dismissed.

It is a well settled rule that in the construction of a statute, the intention of the legislature is to be ascertained by considering the entire statute (Suth. Stat. Const. § 239; *Smith v. Randall*, 6 Cal. 47; S. C. 65 Am. Dec. 475); and that different sections of the same statute must, if possible, be so construed as to be consistent with each other (*Merrill v. Harris*, 57 Am. Dec. 359; S. C. 26 N. H. 142; *Gates v. Salmon*, 95 Am. Dec. 139; S. C. 35 Cal. 576; Suth. Stat. Const. §§ 240, 241; *City of San Diego v. Granniss*, 77 Cal. 511); and so as to effect legislative intention. (*Lindley v. Cross*, 99 Am. Dec. 610; S. C. 31 Ind. 106.)

It is also a well settled rule of law that "elections cannot be held and offices acquired at the mere option of the office seeker. In order, therefore, to the holding of a valid election, authority so to hold it must be found conferred by the people, either directly through the constitution which they themselves ordained, or indirectly through the enactments of their legal representatives, the legislature. Without such authority, no election, except it be one held with the unanimous consent of all persons entitled to participate, can be of any legal importance" (Mechem on Pub. Offices, § 170; *State ex rel. v. Simon*, 20 Or. 365); and enactments declaring the time at which the election shall be held are deemed to be matters of substance, and must be substantially observed or the election will be void. (Mechem on Pub. Offices, § 178.)

The office of attorney-general is not an office specially provided for in the constitution, but one created by the legislature; and the legislature had the power to determine when the first election should be held for the purpose of filling that office by election; but it could not create any

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office the tenure of which shall be longer than four years. (Article 15, section 2, Constitution.)

Section 2 of said act provides that "there shall be elected by the qualified voters of the state of Oregon, at the general election to be held in June, 1894, and each fourth year thereafter, an attorney-general"; and there is nowhere in the statute any provision for the election of an attorney-general prior to that time, unless it can be held that the fifth section provides for an election in 1892; and whether or not this section does so provide, must be determined by so construing both sections that they will be consistent with each other. That portion of section 5 which calls for a construction in this proceeding is substantially as follows: "Upon the approval of this act, * * * the governor shall appoint a suitable person to be attorney-general, who shall hold his office until the next general election, when his successor shall be elected and qualified as provided in this act." It is true, the constitution provides that general elections shall be held on the first Monday in June biennially, (article 4, section 14,) but it does not necessarily follow that the words "next general election, when his successor shall be elected and qualified as provided in this act," mean the first general election after the passage of the act; and in this particular instance we think the "next general election" referred to is the general election to be held in June, 1894, as it is the only general election referred to in the act, and is the only one provided for therein. We are the more fully satisfied that this is the proper construction of these two sections, for the following reasons: It is provided in section 2 of said act that "the term of the office of attorney-general shall commence on the same day as secretary of state, as now provided by law"; and this court takes judicial notice that the term of office of secretary of state next succeeding the creation of the office of attorney-general will not commence until the second Monday in January, 1895. At that time the attorney-general

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to be elected under this act must qualify. If the attorney-general should be elected in June, 1892, he could not qualify until that time; but that statute expressly provides that an attorney-general must be elected in June, 1894, and the officer elected at that time must qualify on the same date. There would then be two persons each claiming the same office by election and both required to qualify on the same day.

The original bill as introduced provided for the first election of attorney-general at the first election held after the approval of this act, but it was so amended as to provide that the election should take place in June, 1894. (Senate Journal, 1891, 587.) This shows conclusively that it was the intention of the legislature that no election for attorney-general should be held until June, 1894, and that the provision in section 5 simply means that the appointee of the governor should hold the office until the next general election, at which his successor should be elected as provided in the act, to wit, at the general election in June, 1894.

It is provided in said act that the attorney-general, when elected, shall hold his office for the term of four years, and until his successor is elected and qualified. There is no provision for the election of an attorney-general for a shorter time than four years; and if an attorney-general should be elected in June, 1892, his term would certainly be for four years and until his successor is elected and qualified. (*State ex rel. v. Johns*, 3 Or. 533.) In that case it was held that the term of an office attaches to the person of the individual elected to fill the same.

It is claimed by the respondent that the court cannot look to the senate journal for aid in construing the act, but no authority is cited to sustain that contention. It is a well-known fact that the debates and journals of constitutional conventions, as well as legislative bodies, are constantly consulted and referred to for the purpose of aiding courts called

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upon to expound their acts and construe their language in arriving at a conclusion as to the true meaning of the language. In construing statutes, the primary object of the court should be to effectuate the intent of the law-maker, and for such purpose it is proper for a court to look into the circumstances at the time and the necessity which called for the enactment of a particular statute. (*Keith v. Quinney*, 1 Or. 364.) In *State ex rel. v. Simon*, *supra*, this court, per BEAN, J., said: "The rule is unquestioned that in the construction of a statute, the cardinal point is to ascertain the intention of the legislature; but it is just as well settled that this intention must be ascertained from the words used in connection with the surrounding circumstances." (*Walter A Wood Co. v. Caldwell*, 54 Ind. 270; 23 Am. Rep. 641; *Stout v. Board of Comrs.* 107 Ind. 343; 7 Rights, Rem. & Pr. § 3773; *New England Car Co. v. B. & O. R. R. Co.* 69 Am. Dec. 181; S. C. 11 Md. 81.)

Now, if the intention of the legislature can be ascertained in any other manner than from the language used, we know of no more certain guide or better authority for that purpose than the record made by such legislature while such statute was under consideration; and the proper phraseology to be employed to effectuate the legislative intent, was the very matter brought to the attention of the legislature. We think, therefore, that in construing this statute, we are entitled to look to the journals of the senate for the purpose of aiding us in determining the legislative intent in all cases where the intent is not obvious from the language employed.

It was claimed by the respondent that under section 16, article 5, of the constitution, the governor could not appoint any one to fill a vacancy in an office who could hold such office beyond the next general election which might be held after such officer was appointed; but if the construction which we have placed upon this statute be correct, the reasoning of this court in *State ex rel. v. Johns*, *supra*, does

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not apply, for the reason it is there said, "if the people have surrendered that power (the power to elect) it should be by express and unequivocal words." In this case the legislature, representing the people, created the office of attorney-general, provided when the first election should be held under the act, and thereby waived the right to elect at any time prior to June, 1894. The provision of the constitution referred to does not limit the right of the governor to appoint to an office until the next succeeding general election, but until the successor of such appointee shall be elected and qualified; and if no election is provided for in this act prior to June, 1894, none can be held, and the present incumbent would hold the office until his successor shall be elected at that time and duly qualified.

We are therefore of the opinion that no election for attorney-general can be held at the ensuing June election, and that the judgment appealed from must be reversed and the writ dismissed.

[Filed June 9, 1892.]

STATE OF OREGON v. E. P. ROGERS.

STATUTORY CONSTRUCTION—RAILROADS—LONG AND SHORT HAUL—REPEAL BY IMPLICATION.—The provisions of the act of February 20, 1885, making it unlawful for persons engaged in the transportation of freight to charge more for a shorter than for a longer haul of a similar kind or amount of property, etc., are by necessary implication repealed by the terms of the act of February 20, 1891, which empower the board of railroad commissioners to establish freight rates subject to revision by the courts in a procedure provided for in the latter act.

LEGISLATIVE JOURNALS—VALIDITY OF STATUTE—PRESUMPTION.—When it affirmatively appears from journals of the legislature that a bill as filed in the office of the secretary of state did not in fact pass the legislature, the courts will pronounce it invalid; but every reasonable presumption is to be made in favor of legislative proceedings; and when the constitution does not require certain matters to be entered in the journal, the absence of such a record will not invalidate a law.

Linn county: R. P. BOISE, Judge.

Defendant appeals. Reversed.

23	348
30	591
22	348
35	401
22	348
39	536
22	348
44	442
44	443
22	348
46	332

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W. D. Fenton, for Appellant.

The act is made unlawful only when the shipment is domestic freight. The indictment should aver the amount of freight, or some amount of freight shipped, and the compensation charged; and when an agent is indicted, there should be an averment that the charges were made by authority of his principal. (Const. Oregon, art. 1, § 11; Bish. Stat. Cr. §§ 373, 385, 1039; 1 Bish. Cr. Proc. §§ 77, 104, 499, 592, 593; 1 Whar. Cr. Law, §§ 285, 288, 299, 304; *Hubbard v. State*, 11 Ind. 554; note to *State v. Campbell*, 94 Am. Dec. 253; *People v. Aro*, 6 Cal. 209; *State v. Bennett*, 11 S. W. Rep. 265, Mo. March 18, 1889; *State v. Butcher*, 79 Iowa, 110; *U. S. v. Carl*, 105 U. S. 612; *U. S. v. Hess*, 124 U. S. 487.)

The particular carload or quantity shipped, and the particular freight charged, in the particular case prosecuted, should be stated in the indictment. The corporate existence of the Southern Pacific Company and the partnership of Isom, Lanning & Co. should have been alleged and proven. (*People v. Schwartz*, 32 Cal. 160; Whar. Cr. Ev. § 102 a; *People v. Bogart*, 36 Cal. 248; *Wallace v. People*, 63 Ill. 452; *Jones v. State*, 5 Sneed, 346; *State v. Mead*, 27 Vt. 722.)

The indictment should have affirmatively charged that these shipments were domestic freight. (*State v. Godfrey*, 24 Me. 232; 41 Am. Dec. 382; *State v. Tamler*, 19 Or. 529; note to *State v. Campbell*, 94 Am. Dec. 255; *U. S. v. Cook*, 17 Wall. 176; *People v. Telford*, 56 Mich. 544; *State v. Abbey*, 29 Vt. 60; S. C. 67 Am. Dec. 757.)

An indictment charging a shipment from Albany to East Portland by Isom, Lanning & Co. at seven and one-half cents per hundred pounds, is not supported by proof of a shipment from Albany to Portland by same firm at nine and one-half cents per hundred pounds; and when the proof shows also that the rate charged from Millersburg to East Portland was eight and three-quarter cents per

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hundred pounds, no crime is shown. (Whar. Cr. Ev. §§ 109-121; Greenl. Ev. § 65.)

The legislative assembly of the state had no power or authority to enact the statute in question; and as to this highway and as to this defendant, the act is in violation of the charter of the company owning the road, and in violation of the constitution of the United States, which prohibits the passage of any law impairing the obligation of contracts. (Morawetz, Corp. §§ 422-476, 1057-1075; Field, Corp. § 32; *Sloan v. Pacific R. R.* 61 Mo. 24; 21 Am. Rep. 397; *Pacific R. R. v. Maguire*, 20 Wall. 36; *Wilmington R. R. v. Reid*, 13 Wall. 268; *Miller v. State*, 15 Wall. 488; *Binghampton Bridge Case*, 3 Wall. 73; *State Freight Tax*, 15 Wall. 277; *P. W. & B. R. R. Co. v. Bowers*, 4 Houst. 506; *State v. Noyes*, 47 Me. 216; *New Orleans Gas Co. v. La. Light Co.* 115 U. S. 663; *Trustees Dartmouth College v. Woodward*, 4 Wheat. 638; *Boston etc. Corp. v. Salem etc. R. R. Co.* 2 Gray, 33; *Wales v. Stetson*, 2 Mass. 143; 3 Am. Dec. 39.)

There is no difference in principle between a contract created by express charter and a contract which arises where a corporation is created under a general law. (*Abbott v. Johnstown etc. Ry. Co.* 80 N. Y. 27; 36 Am. Rep. 572.)

It is conceded that the granting of power to a railroad company the right, from time to time, to regulate its own tolls and charges does not deprive the state of its power to act upon the reasonableness of the charges so fixed. (*Stone v. Wisconsin*, 94 U. S. 181; *Munn v. Illinois*, 94 U. S. 113; *Peik v. Chicago etc. Ry. Co.* 94 U. S. 165; *Ruggles v. Illinois*, 108 U. S. 529; *Spring Valley Water Works v. Shotlter*, 110 U. S. 352; *R. R. Commission Cases*, 116 U. S. 307, 356; *Georgia Banking Co. v. Smith*, 128 U. S. 177; *Chicago etc. R. R. Co. v. Minnesota*, 134 U. S. 455.)

The defendant was entitled to show that the charges made for these shipments in question were reasonable in amount, and if so, he had a right to make them. (*Ex parte*

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Koehler, 11 Saw. 37, 194; *Wells, Fargo & Co. v. O. R. & N. Co.* 8 Saw. 614.

Income and the right to earn it are essential attributes of private property, and the only limit to the use or enjoyment under a free government is that use expressed by the maxim *sic utere tuo ut alienum non laedas*. (*Commonwealth v. Essex Co.* 13 Gray, 239; 2 Ror. Railroads,*1368; *Hamilton v. Keith*, 5 Bush, 458; *A. & F. R. R. Co. v. Burkett*, 46 Ala. 569; 3 Wood's Railway Law, 1691; *Stone v. Yazoo & Miss. R. R. Co.* 62 Miss. 607; 52 Am. Rep. 193; *Morgan v. Louisiana*, 93 U.S. 223.)

The shipments made were interstate commerce. (*The Daniel Ball*, 10 Wall. 565.) The fact that several different and independent agencies are employed in transporting a commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction, and to the extent in which agencies act in that transportation it is subject to the regulation of congress. (*Norfolk etc. R. R. Co. v. Pennsylvania*, 136 U.S. 119; *Wabash etc. R. R. Co. v. Illinois*, 118 U.S. 557.)

The judgment was erroneous because the law defining the crime permits unusual and unlimited punishment to be inflicted. The punishment prescribed by section 4036 of the code, and the clause conferring authority upon the court to impose the penalty, is in this language: * * * "upon conviction thereof be fined not less than one thousand dollars." It is a fundamental principle that in a criminal statute the legislature must define the punishment to be inflicted. The power to define the punishment is legislative and not judicial, and the power to define, prescribe, or place limits upon the punishment cannot be delegated to the courts. (*Cooley's Const. Lim.* 139.) The statute is void, not because the fine in this case was the minimum and a reasonable one, but because the law delegated to the court unlimited power in creating the penalty. (*Barker v. People*,

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3 Cow. 703; Cooley's Const. Lim. 402, 403, 5 ed.; *In re Resenheim*, 83 Cal. 388; *People v. Morris*, 80 Mich. 634.)

The law under which this prosecution was begun had been repealed before the trial, and hence the prosecution must fail. (Endlich Interp. Stat. §§ 478-484.) It is strange if the railroad commission has full power to fix the limit of all charges under the act of 1891, and yet that the act of 1885 is still in effect, which gives to the carrier the right to do the same thing, and requires him to do it, and keep it in force within certain limits. The two statutes cannot stand together, and upon a well settled rule the latter statute repeals the former by implication. (Suth. Stat. Const. §§ 138-166; Endlich Interp. Stat. §§ 187-241; *Stingle v. Nevel*, 9 Or. 62; *State v. Gaunt*, 13 Or. 115; *Little v. Cogswell*, 20 Or. 345.)

It appears that the yeas and nays were not ordered or taken, and that the final passage of this law, in so far as it relates to the bill as amended, was attempted without compliance with the requirement that every bill shall be read by sections, etc. (Article 4, section 19, const.; *Currie v. S. P. Co.* 21 Or. 566; *Rode v. Phelps*, 80 Mich. 609; *County of San Mateo v. S. P. R. R. Co.* 8 Saw. 238; S. C. 13 Fed. Rep. 767; *Spangle v. Jacoby*, 14 Ill. 297; S. C. 58 Am. Dec. 574; note to *Jones v. Jones*, 51 Am. Dec. 616; *Commissioners v. Higginbotham*, 17 Kan. 62; *People v. Com. of Highways*, 54 N. Y. 276; 13 Am. Rep. 581; *People v. Starnes*, 35 Ill. 121; 85 Am. Dec. 348.

The state of Oregon has no power or authority to regulate fares and freights on the line in question. This road is a national highway, made so by act of congress, and those operating it are instruments of national power and authority. The right, therefore, to regulate and control the same in the respects named in the indictment, or in any respect, excepting those strictly pertaining to the exercise of the police power of the state, is exclusively one in the federal congress. (*California v. Pacific R. R. Co.* 127 U.S. 39; *Pacific R. R. Removal Cases*, 115 U. S. 18; *Robbins v. Shelby*,

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120 U. S. 492; *Phila. S. S. Co. v. Pennsylvania*, 122 U. S. 338; *U. S. v. U. P. R. R. Co.* 91 U. S. 79; *R. R. Co. v. Peniston*, 18 Wall. 34; *Collector v. Day*, 11 Wall. 127; *Osborne v. Bank of U. S.* 9 Wheat. 867; *Van Brocklin v. Tennessee*, 117 U. S. 151.)

Geo. E. Chamberlain, attorney-general, and *Geo. G. Bingham*, district attorney, for Respondent.

It is questionable if it is necessary to allege in the indictment the name of the corporation at all. If the indictment simply alleged that at the time charged in the indictment the defendant was the agent of a railroad corporation operating a road in this state, the defendant is then brought within the plain purview of the statute. But the indictment does allege the name of the railroad corporation, and no question is raised as to the correctness of the allegation of the corporate name. On principle and on authority it is sufficient to name the corporation correctly, without alleging the incorporation. (*Bish. Dir. and Forms*, § 79; *Bish. Crim. Proc.* § 682; 2 *Bish. Crim. Proc.* §§ 445, 455, 456; *McCarney v. People*, 83 N. Y. 408; 38 *Am. Rep.* 456; *Noakes v. People*, 25 N. Y. 380; *Murphy v. State*, 36 *Ohio St.* 628; *Burke v. State*, 34 *Ohio St.* 79.)

It has repeatedly held that an indictment is sufficient which charges the offense substantially in the language of the statute. (*State v. Ah Sam*, 14 *Or.* 347; *State v. Dale*, 8 *Or.* 229; *State v. Bergman*, 6 *Or.* 341; *State v. Carr*, 6 *Or.* 133; *State v. Wintzingerode*, 9 *Or.* 153; *Lechi v. Territory*, 1 *W. T.* 13; 1 *Bish. Crim. Proc.* 611; 1 *Whar. Crim. Law*, § 364; *Barton v. State*, 43 *Am. & Eng. R. R. Cas.* 334; *People v. Enoch*, 13 *Wend.* 172; 27 *Am. Dec.* 197.)

As to the form of indictment in such cases, see *U. S. v. Michigan Cent. R. R. Co.* 43 *Am. & Eng. R. R. Cas.* 334; *U. S. v. Tozer*, 37 *Fed. Rep.* 635; 39 *Fed. Rep.* 369, 904.)

It is contended by counsel that the indictment is defective in that it does not charge that the shipments were domestic freight. This is not necessary. If upon the trial

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it had appeared that the freight was, as a matter of fact, interstate traffic, the defendant would have been entitled to an acquittal. As a matter of fact, however, the indictment does charge affirmatively that the freight was domestic freight, for it charges the place of destination as well as the point of beginning, both within the state. (*State v. Tumler*, 19 Or. 531; *Mills v. Kennedy*, 1 Bailey (S. C.), 17; 1 Bish. Crim. Proc. §§ 631, 633.)

It is not necessary to charge the defendant with having charged a fixed sum of money on a fixed and certain amount of grain. It is sufficient to charge a certain rate per hundred pounds for a similar kind of goods, and that the amount charged per hundred is more for the shorter than the longer haul. This the indictment specifically charges. (*Junod v. Chicago & N. Ry. Co.* 47 Fed. Rep. 295.)

Repeals by implication are not favored, and a subsequent affirmative statute does not repeal a prior one unless there is a direct and irreconcilable conflict between the two. (*Robbins v. State*, 8 Ohio St. 131; *McCartee v. O. A. Society*, 9 Cow. 437; 18 Am. Dec. 516; *State v. Woodside*, 9 Ired. 496; *McCool v. Smith*, 1 Black, 459; *Naylor v. Field*, 29 N. J. L. 287; *State v. Berry*, 12 Iowa, 58; *State v. Dupuis*, 18 Or. 372; *People v. S. F. etc. R. R. Co.* 28 Cal. 254; *Blain v. Bailey*, 25 Ind. 165; *People v. Barr*, 44 Ill. 198; *Supervisors v. Campbell*, 42 Ill. 490; *Hume v. Gossett*, 43 Ill. 297; *McLaughlin v. Hoover*, 1 Or. 31; Endlich Stat. Const. § 210; *State v. Benjamin*, 2 Or. 125; *State v. Dale*, 8 Or. 235; *Cooley v. Const. Lim.* 183; *Potter's Dwar. Stat.* 155.)

Counsel for defendant contends that the legislative assembly had no authority to enact the statute in question. But the power of the state to regulate the transportation of passengers and freight is too well settled by the courts to be seriously questioned. (*State Freight Tax Case*, 15 Wall. 232; *Munn v. Illinois*, 94 U. S. 113; *C. B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago etc. R. R. Co.* 94 U. S. 164; *Stone v. F. L. & T. Co.* 116 U. S. 307; *Gloucester Ferry Co. v.*

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Pennsylvania, 114 U. S. 196; *Pickard v. Pullman Car Co.* 117 U. S. 34; *Wabash & C. R. R. v. Illinois*, 118 U. S. 563.)

BEAN, J.—The defendant, who is the assistant general freight agent of the Southern Pacific Company, was, in March, 1891, indicted by the grand jury of Linn county for a violation of section 4 of "An act to regulate the transportation of passengers and freight by railroad companies," commonly known as the "Hoult law," approved February 20, 1885, which reads as follows: "Section 4. That it shall be unlawful for any person engaged in the transportation of property as prescribed in the first section of this act, to charge or receive any greater compensation for a similar amount or kind of property for carrying, receiving, storing, forwarding, or handling the same for a shorter than a longer distance in the same direction." During the pendency of the prosecution, and before the trial in the court below, the act of February 20, 1891, (2 Hill's Code, 2 ed. 1967,) entitled "An act to increase the power and further define the duties of the board of railroad commissioners in respect to the management, operation, and control of railroads, and the transportation of persons and property within the state of Oregon," went into effect. Whereupon the defendant moved to quash the indictment and for his discharge, upon the ground that the act of 1891 operated as a repeal by implication of the provisions of the act of 1885, under which he was indicted. The motion was overruled, and the trial resulted in a verdict and judgment against the defendant, from which this appeal is taken.

The record contains numerous assignments of error, but the main question we shall consider is, whether the provisions of the act of 1885, upon which this prosecution is founded, was repealed by the act of 1891; for it is admitted by the attorney-general that if such is the case, the prosecution fails, as there is no saving clause in the latter act. It is not claimed that any of the provisions of the act of

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1885 are expressly repealed by the act of 1891, but the contention is, that the two acts are in such direct and irreconcilable conflict that both cannot stand, and the latter operates as a repeal of the former by implication. A brief review of the legislation of this state in the matter of regulating the transportation of passengers and freight by railroad companies is necessary to a proper understanding of the question now before us. The first legislation upon the subject was the act of 1885, which in terms provides that no railroad company shall "charge or receive from any person who is to be conveyed over any railroad or railroads in this state any sum exceeding four cents per mile for the distance to be traveled by such person"; and for carrying freight, the rates a schedule of which shewing the rates from all stations to all stations is required to be posted on the first Monday in July and January of each year, and not increased during the succeeding six months, "shall not exceed the rates charged (by the carrier) on the first day of January, 1885," and shall be alike to all persons for "like and contemporaneous service." By this act it is made unlawful for any railroad company engaged in the transportation of property directly or indirectly, to allow any rebate, drawback, or other advantage in any form upon shipments made or services rendered in carrying or handling domestic freight of similar grade, or to "enter into any combination or agreement * * * with intent to prevent the carriage from being continuous from the place of shipment to the place of destination, whether carried on one or several railroads in this state," or "to enter into any contract, agreement, or combination for pooling freight, or to pool freights of different and competing roads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion of them," or "to charge or receive any greater compensation for a similar amount or kind of property for carrying, receiving, storing, forwarding, or handling the same for a

shorter than a longer distance in the same direction." For a violation of any of the provisions of the act, the officers and agents of the company are made liable to indictment, and a civil remedy is given to the party damaged, in which he may recover treble damages.

This act is in effect a maximum rate law. It was only designed, as its title clearly implies, to regulate the transportation of freight and passengers by railway companies, and subject to its provisions, the power to fix freights and fares remained with the carrier. The carrier was at liberty to fix the charges for carrying both passengers and freight over its line at any rate it might deem advisable; subject only to the limitation that for passengers, the fare should not exceed four cents per mile; and for freight, the rate should not exceed that charged by the carrier on the first day of January, 1885, and not increased oftener than once every six months; and no discrimination should be made in favor of or against persons or places, by rebate, drawback, combination; or pooling agreements or arrangements, or by charging more for a shorter than a longer haul in the same direction. Thus matters stood until the session of 1887, when "An act creating and establishing a board of railroad commissioners, and to define and regulate its powers and duties, and to fix the compensation of its members," was passed. (Laws, 1887, 30.) This law provided for two commissioners to be appointed by the governor, who should have only supervisory powers over railways, and with no authority to in any manner regulate or fix freights or fares, for carrying either freight or passengers. (*Railroad Com. v. Railroad Co.* 17 Or. 65.)

In 1889 (Laws, 1889, 2) the commission act was amended by increasing the number of commissioners to three, and providing that they should be chosen by the legislative assembly biennially, but no attempt was made to invest the commission with power or authority to fix freights or fares. The power to fix freights and fares still rem

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with the carrier, subject to the provisions of the act of 1885, and with no authority in the commission to even determine whether the rates so fixed were reasonable or unreasonable. (*R. R. Comrs. v. R. R. Co. supra.*) In this condition of the law, the act of February, 1891 (Laws, 1891, 123), was passed. By this act it is provided that within ninety days after it becomes a law, it shall be the duty of every railroad company to furnish the board of railroad commissioners with a schedule of charges for the transportation of persons and property; and it is made the duty of the commission, and it is empowered "to revise such schedule so furnished, and determine whether or not, and in what respect, if any, such charges are more than a reasonable and just compensation for the services to be rendered, and whether or not unjust discrimination is made in such tariff of charges against any person, locality, or corporation"; and when the schedule is corrected and approved by the commission, it shall append a certificate of approval thereto. In case any railroad company shall fail to furnish the schedule of charges as required, the commission is authorized and empowered to fix a tariff of charges for such railroad, notwithstanding such failure; but in revising or establishing any tariff, the commission is required to take into consideration "the character and nature of the service to be performed, and the entire business of such railroad, together with its entire earnings from passenger and other traffic, and to so revise such tariffs as to allow a fair and just return on the value of such railroad, its appurtenances, and equipments," and to "continue such tariff of charges from time to time as justice to the public and each of said railroads may require, and to increase or reduce said rates according as experience or business operations may show to be just." In case a carrier refuses to comply with the tariff of charges as approved and fixed by the commission, the commission is authorized and empowered to commence a suit in the proper county, for the

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purpose of requiring such carrier to comply with such tariff, leaving to the courts the question of the reasonableness of the rates prescribed by the commission. The commission is also authorized to hear and determine the complaint of any person aggrieved by any act of the carrier, and the findings of the commission thereon are made *prima facie* evidence in all subsequent judicial proceedings involving the same question. And if any carrier refuses or neglects to comply with the findings of the commission, it is made its duty to commence proper proceedings in the name of the state to enforce such findings. It is also provided that if any carrier subject to the provisions of the act, "shall charge, demand, or receive any greater amount for the transportation of persons or property than the rates approved and fixed by the commission, and which rates may thereafter be adjudged to be reasonable by the proper circuit court, in the manner provided by section 2, * * * and such excess of charges is not repaid to the party injured by such overcharge within thirty days after written demand therefor, any person, firm, or corporation, who has paid such overcharges, may recover from such railroad company, * * * in an action in the circuit court of the county where such sum was paid, double the amount of all sums so paid over and above the rates approved and fixed as aforesaid, together with the costs and disbursements of such action, and such further sum as the court shall adjudge a reasonable sum as compensation for attorney fee in bringing and maintaining such action."

It may be stated as a general rule that repeals by implication are not favored; and a subsequent affirmative statute does not repeal a prior one unless there is a conflict between the two which is direct and irreconcilable. But where such conflict does exist, and the two statutes cannot be reconciled under the rules of statutory construction, the subsequent statute, being the later expression of the legislature on the subject, must be considered in force, and to operate as a

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repeal by implication of all prior acts or parts of acts in conflict therewith. (*Grant Co. v. Sels*, 5 Or. 243; *Hurt v. Hawn*, id. 275; *Fleischner v. Chadwick*, id. 152; *Little v. Cogswell*, 20 Or. 345; *U. S. v. Tynen*, 11 Wall. 88.) That there is a direct and irreconcilable conflict between the provisions of the Hoult law, under consideration, and the act of 1891, seems obvious. The two acts cover the same ground, and are antagonistic in theory, and opposed in practice. By the one, the carrier is permitted to fix the rates for the transportation of persons and property, subject only to the limitations of the act; while by the other, this authority is taken from it and vested in the commission without limitation, except that the tariff as fixed by it shall be just between the carrier and the public, and shall be such as to "allow a fair and just return on the value of such railroad, its appurtenances and equipments." By the former act, the tariff, when fixed and posted, cannot be increased during the succeeding six months; while by the latter, the commission is authorized to change the rates from time to time, "as justice to the public and the railroad companies may require, either increasing or reducing them, as experience or business interests may show to be just." Under the Hoult law, in no case was the carrier permitted to charge or receive more than four cents a mile for carrying passengers, or rates in excess of those charged by it on the first day of January, 1885, for carrying freight, although as a matter of fact its business might be conducted at an absolute loss; while by the act of 1891, the commission is required to so fix the tariff, considering the character and nature of the services to be performed and the entire earnings of the road, as to "allow a fair and just return on the value of the road, its appurtenances and equipments," which necessarily requires it to exceed the maximum limits of the Hoult law if necessary to allow such just and fair return. By the former, the legislature declared without qualification that a greater charge for a shorter haul than a longer one in the same

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direction is unjust discrimination against places; while the latter act, recognizing the fact that a less charge for a long haul than for a short one, if not made for the sake of putting up one place or another down, but when required by the exigencies of the business, in order to meet competition by water, the carriers on which are not under legislative control, is not necessarily an unjust discrimination, but the result of circumstances over which the carrier has no control, has therefore vested in the commission power and authority to determine whether or not a given tariff schedule constitutes unjust discrimination against or in favor of any locality.

If the act of 1891 simply authorized and empowered the commission to revise and establish freight rates and fares without any affirmative declaration as to what elements and results it should consider in so doing, it might be said that it would be controlled by the maximum limit of the Hault law, and the two acts not be in conflict. But when the legislature declared in affirmative terms that the commission, in revising or establishing rates, "should take into consideration the character and nature of the services to be performed, and the entire business of such railroad, together with its entire earnings from passenger and other traffic, and so revise such tariff as to allow a fair and just return on the value of such railroad, its appurtenances and equipments," it clearly made it the duty of the commission, in fixing rates, to disregard the limitations of the Hault law, if necessary in order to allow such "just and fair return."

The only limitation upon the commission in revising or establishing rates, is that such rates shall be a reasonable and just compensation for the services rendered, and be just as between the public and the carrier. In this respect it is evident the conflict between the two acts is irreconcilable, and both cannot stand. The one fixes the maximum limit at a certain figure, whether such rates afford reasonable and just compensation for the services rendered

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or not; the other fixes the minimum at such rates as will allow a fair and just return to the carrier. If, as is evident, the minimum rate to be fixed or established by the commission under the act of 1891 may, under a possible state of circumstances, exceed the maximum rate of the Houtt law, necessarily the two acts are in conflict, and the latter must prevail. (Suth. Stat. Const. § 145.)

And again, under the Houtt law, the defendant, as assistant general freight agent, had the right to make such rates for the transportation of freight and passengers as he pleased, subject only to the limitations of the act. If he charged or received a greater rate or compensation for a similar amount or kind of property for carrying the same for a shorter than a longer haul in the same direction, he became liable to indictment and punishment for a violation of section 4 of that law, because the rates were under his supervision and control, and such charge was his voluntary act; but as the law now stands, his power to make rates has been entirely withdrawn and vested in the agents and officers of the state. He may, if he so desire, furnish the schedule; but whether he does or not, the making of the rates and their validity is with the commission and the courts; and when so made, and declared reasonable by the courts, the carrier has no option but to put them into effect, and is liable to a prescribed penalty for not doing so. Suppose the defendant should submit to the commission a tariff schedule, showing a greater rate for carrying a similar grade of freight from Millersburg to East Portland than from Albany to the same point of destination, as is claimed he charged in this case, and the commission, in the exercise of the power and authority given it by the act of 1891, should determine that, in view of the competition at Albany by water transportation, or some other sufficient reason, such rates did not constitute unjust discrimination, and should approve the schedule, and the carrier put it into effect, as by law it is compelled

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to do, could it be claimed by the state that defendant is guilty of a violation of the long and short haul clause of the Hoult law in charging the rates prescribed by the commission, when he had no power or authority to make the rates as he did under the Hoult law? Most assuredly not, because the two acts in this respect are in direct conflict and antagonistic in their requirements; and defendant is bound to obey the latter, and not the former act. The state has, by the act of 1891, adopted an entire change of policy in the matter of regulating freights and fares on railroads. Formerly, the legislature in its wisdom was content to leave the right to fix rates with the carrier, subject to certain limitations. In 1891, this policy was completely abandoned; and in its stead the legislature adopted that of a commission with power to fix rates, subject only to the judgment or decree of the courts as to their reasonableness in any given case. We conclude, therefore, that the provisions of the act of 1885, under which defendant was indicted, have been repealed by the act of 1891, and the prosecution must fail.

In order to avoid any misconception of the effect of this decision, it is proper to say that in this case we only hold that so much of the act of 1885 as left to the carrier the right to fix freights and fares subject to certain limitations, and the declaration of that act, that charging more for a shorter than a longer haul is unjust discrimination against places, is repealed by the act of 1891. The provisions of the act of 1885, making unlawful rebate, drawback, combinations, and pooling arrangements or agreements, are not involved in this case; and it is unnecessary for us to consider the effect of subsequent legislation thereon.

It was suggested at the argument that the act of 1891 is void because the requirements of the constitution were not complied with in its enactment. From the journals of the legislature it appears that the act arose out of house bill No. 97, introduced by Mr. Miller of Josephine. It

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regularly passed the house, and was sent to the senate, where it was amended in many material respects. These amendments with the original bill were returned to the house for its concurrence, where, upon motion of Mr. Miller, it was referred to the committee on railroads and transportation, with leave to report at any time. This committee, after consideration of the matter, reported the bill back with a recommendation that the house concur in the senate amendments, and the journal states that "on motion of Mr. Miller, the report was adopted and the house concurred in the senate amendments to house bill No. 97." The objection made is, that the record of the house does not show that the bill as amended was read section by section on its final passage, nor that the vote was taken by yeas and nays. The constitution of this state requires that every bill shall be read section by section on its final passage, and "the vote on the final passage of every bill or joint resolution shall be taken by yeas and nays" (article 4, section 19); but there is no provision that either of these facts shall be entered in the journal, except the vote shall be entered when demanded by two members (article 4, section 13), or upon the passage of a bill notwithstanding the objections of the executive (article 5, section 15). In *Currie v. S. P. Co.* 21 Or. 566, we held that the court will take judicial knowledge of the journals of the legislature for the purpose of impeaching the validity of the enrolled act on file with the secretary of state, and when from such journals it affirmatively appears that the bill as filed in the secretary of state's office did not in fact pass the legislature, the courts will refuse to recognize it as a valid law; but every reasonable presumption is to be made in favor of the legislative proceedings; and when the constitution does not require certain proceedings to be entered in the journal, the absence of such a record will not invalidate a law. It will not be presumed, from the mere silence of the journal, that either house has exceeded its authority

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or disregarded constitutional requirements in the passage of legislative acts. (*Cooley*, Const. Lim. *135; *Taylor v. Wilson*, 17 Neb. 88; *Berry v. R. R. Co.* 41 Md. 446; *State v. Francis*, 26 Kans. 724; *State v. McConnell*, 3 Lea, 332; *Williams v. State*, 6 Lea, 549; *Miller v. State*, 3 Ohio St. 475; *Worthen v. Badgett*, 32 Ark. 496; *State v. Mead*, 71 Mo. 266; *Supervisors v. People*, 25 Ill 181.)

Conceding, therefore, that the provisions of the constitution, that every bill shall be read section by section on its final passage, and the vote taken by yeas and nays, require that every amendment to a bill shall be so read and the vote thus taken, which may be well doubted, (*Miller v. State*, 3 Ohio St. 475,) we must assume, in the absence of an affirmative showing to the contrary, that the constitutional requirements were observed, and hold that the act under consideration was constitutionally passed.

Nor is there any merit in the objection that the act of 1891 purports to be an amendment of existing laws upon the subject, without setting out the sections as amended, as required by section 22, article 4, of the constitution. This act was not designed as an amendment of any existing law, but to increase the powers and further define the duties of the railroad commission, and as supplementary to the then existing legislation on the subject, and therefore does not come within the provisions of the constitution above cited. (*David v. Portland Water Co.* 14 Or. 98; *Suth. Stat. Const.* 135.)

The judgment of the court below is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

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[Filed June 9, 1892.]

THE UMATILLA IRRIGATION CO. v. THE UMATILLA IMPROVEMENT CO. ET AL.

EQUITY—INJUSTICE—FRANCHISE—HOSTILE INTERFERENCE.—Before a court of equity will interfere to restrain an infringement upon the enjoyment of a franchise, it must appear that some hostile overt act has been done by the party complained of; a mere intent not acted upon, is insufficient.

Umatilla county: JAMES A. FEE, Judge.

Defendants appeal. Reversed and dismissed.

This is a suit brought in the circuit court for Umatilla county by the above named respondent against the appellants and defendants under the provisions of the act of the legislative assembly, dated the eighteenth day of February, 1891, commonly known as the irrigation law.

The respondents, and the appellants, the Blue Mountain Irrigation & Improvement Company, the Rauch Irrigation Company, the Oliver Ditch Company, and the Valley Irrigation Company, all claim or are charged to be private corporations, organized under the laws of this state; and all of them, along with the other parties named as defendants, appeared to have made appropriations of water from the Umatilla river or its tributaries. This suit was brought to test the priority of rights so acquired. N. Williams, J. S. Hughes, J. P. Williams, and A. M. Gunn filed an answer disclaiming any interest in the matter. The Blue Mountain Irrigation & Improvement Company, the Rauch Irrigation Company, J. H. Rauch, F. H. Kearney, J. A. Marston, Lot Livermore, and J. H. Parks filed general demurrers to the complaint, which were all overruled, and thereupon none of them appeared further in the case. M. V. Rauch was charged with having some joint interest with J. H. Rauch and F. H. Kearney; he was not served with process and did not appear. The Oliver Ditch Company and the Valley Irrigation Company were duly served with process, but made no appearance. The Umatilla Improvement Com-

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pany filed a motion to make the complaint more definite and certain, and the Umatilla Meadows & Butter Creek Canal Company and the Columbia Valley Land & Irrigation Company filed general demurrers to the complaint; this motion and both demurrers were overruled and thereupon the defendants answered. Issue was joined by reply, and the testimony was taken in open court. The matter was fully contested and determined upon the proofs as between the respondent and the appellants, the Umatilla Improvement Company, and the Columbia Valley Land & Irrigation Company. The Umatilla Meadows & Butter Creek Canal Company offered evidence in support of its answer; but objection was made by the respondent that the facts stated in the answer failed to set forth any defense or to show that said appellant had any interest in the controversy, which objection was sustained by the court. A final decree *pro forma* was entered in favor of the respondent, from which these parties have taken appeals. The further facts sufficiently appear in the pleadings.

The complaint is as follows, to wit:—

“Plaintiff complains, and for cause of action alleges, that it is a private corporation, organized and existing under and by virtue of the laws of the state of Oregon, with its principal office at the town of Pendleton in said state.

“That the defendants, the Umatilla Improvement Company, the Columbia Valley Land & Irrigation Company, the Blue Mountain Irrigation & Improvement Company, the Rauch Irrigation Company, the Oliver Ditch Company, and the Valley Irrigation Company, each claims to be a like corporation, having its principal office at said town, and the Umatilla Meadows & Butter Creek Canal Company claims to be a like corporation, having its principal office at the town of Echo, in said state.

“That the enterprise and business for which the plaintiff was incorporated, and in which it is now engaged is, among

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other things, the construction and maintenance of a ditch and flume for supplying water to the general public for compensation, by way of rental or sale, for purposes of irrigation and supplying water for household and domestic consumption, and watering live stock upon dry lands of the state of Oregon, situated in Umatilla and Morrow counties.

"That the plaintiff is, and was on the twenty-first day of February, 1891, duly authorized and empowered by the laws of the state of Oregon and its articles of incorporation, to appropriate and divert water from the natural channel of the Umatilla river and Wild Horse creek, a tributary of said river, and other tributaries thereof, for the purposes aforesaid, and to construct and maintain a ditch and flume for the purposes of carrying the water so appropriated to the places where it is to be used, and to construct and maintain dams, reservoirs, and feeders, for the purpose of assisting in the appropriation and diversion of said water, and for storing water for future use, and distributing ditches for the purpose of distributing the water appropriated upon the ground where the same is to be used.

"That having been so organized and being so empowered, and being desirous of diverting water from said Umatilla river and Wild Horse creek, said plaintiff did on said day select a point of diversion of the water of said river, and did then post a written notice in a conspicuous place at said point, setting forth therein the name of the ditch and flume intended to be constructed and operated by the plaintiff, and the name of the owner thereof, the point at which the headgate of said ditch and flume was proposed to be located, a general description of the course of said ditch and flume, the size of said ditch and of said flume in width and depth, the number of reservoirs intended to be constructed for use in connection with said ditch and flume, and that the plaintiff thereby appropriated fifty thousand inches, by miner's measurement, of the water of said river.

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"And on said day the plaintiff did in like manner select a point of diversion of the water of said Wild Horse creek, and did then post a written notice in a conspicuous place at said point in all respects similar to the notice above mentioned, save that in lieu of fifty thousand inches it was therein set forth that the plaintiff thereby appropriated five thousand inches, by miner's measurement, of the water of said creek.

"That the course of said ditch and flume, as set forth in said notice, together with its distributing ditches, reservoirs and feeders, lies wholly within Umatilla county, and within ten days from the posting of said notices, to wit, on the third day of March, the plaintiff filed for record in the office of the county clerk of said county a copy of each of said notices as the same were posted, and at the same time filed for record in said office a map showing the general route of said ditch and flume.

"That thereafter, to wit, on the seventh day of March, for the purpose of more definitely specifying the plaintiff's point of diversion of said river, and in aid of its said appropriation therefrom, but without changing in any respect said point of diversion, the plaintiff posted a further notice of appropriation at the point where the first notice was posted, in all respects similar thereto, save that the point of diversion was more particularly described therein; and thereafter, to wit, on the tenth day of March, for the purpose of more definitely specifying the plaintiff's point of diversion on said creek, and in aid of its said appropriation therefrom, but without changing in any respect said point of diversion, the plaintiff posted a further notice of appropriation at the point where the first notice was posted, in all respects similar thereto, save that the point of diversion was more particularly described therein; and within ten days thereafter, to wit, on the sixteenth day of March, the plaintiff filed both of said notices for record in the office of the county clerk of said county.

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"And thereafter, to wit, on the twenty-second day of October, for the purpose of more definitely specifying the plaintiff's said point of diversion on said river, and more particularly fixing the amount of water by it appropriated, and in aid and confirmation of its said appropriation, but without changing in any respect said point of diversion, the plaintiff posted a further notice of appropriation at the point where the above mentioned notices had been posted on said river, in all respects substantially similar thereto, save that the point of diversion was more particularly described therein, and it was stated that the appropriation made by the plaintiff was fifty thousand inches of water, by miners' measurement, under a six-inch pressure; and on the twenty-fourth day of October the plaintiff filed a copy of said notice, together with a map showing the general course of said ditch and flume, in the office of the county clerk of said county for record; and on the twenty-sixth day of October, with a purpose and intent similar to that last above set forth, and in aid and confirmation of its appropriation from Wild Horse creek, the plaintiff posted a further notice of appropriation at a point about four hundred yards below the point where the first two had been posted on said creek, in all respects substantially similar thereto, save that the point of diversion was more definitely described therein, and it was stated that the appropriation made by the plaintiff was five thousand inches of water, by miners' measurement, under a six-inch pressure; and on the twenty-ninth day of October the plaintiff filed a copy of said notice, together with a map showing the general course of its ditch and flume, in the office of the county clerk of said county for record.

"That within six months from the date of posting said first mentioned notices, the plaintiff commenced the actual construction of its proposed ditch and flume, and since the date of commencement has prosecuted such construction without intermission; that the actual capacity of said ditch

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and flume, as the same is being constructed, is in excess of fifty-five thousand inches of water, by miners' measurement, under a six-inch pressure.

"That the total amount of water naturally running in the channel of the Umatilla river during the course of each year varies from fifty-five thousand inches to one thousand four hundred inches, miners' measurement, under a six-inch pressure, or thereabouts; and the total amount so running in the channel of Wild Horse creek varies from five thousand inches, by like measurement, to nothing.

"That the course of the ditch and the flume intended to be constructed and operated by the plaintiff has been located and staked out and lies wholly across dry lands in Umatilla county, state of Oregon; that there is no living water upon said lands, save at the points where they are crossed by said Umatilla river and Wild Horse creek, and the natural rainfall is inadequate to supply the needs of persons living upon and owning the same for purposes of irrigation, household and domestic consumption, or watering live stock; nor is there any means whereby the necessities of such persons in such behalf can be satisfied save by the agency of a ditch carrying water upon said lands, and there is no source of supply for said ditch save the streams aforesaid; that along the line of the plaintiff's ditch and flume, as the same has been surveyed and located, there is a great tract of agricultural land, to wit, more than one hundred thousand acres, capable of being supplied by water from said ditch and flume, which, with the application of water, will become very productive and valuable, and will sustain a large population and a great number of live animals; but without water, as the same now are, said lands are unproductive and of but little value, and will not support man or beast; that said lands are in part owned by private persons, and in part by the government of the United States; that more than half said amount is held by private persons and has been occupied and cultivated by

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the owners thereof, but for want of water the cultivation and occupancy thereof have proved a failure, and said lands are being largely abandoned by the owners thereof, while for the same reason such portion of said lands as now belongs to the government of the United States will not be taken or occupied by private persons; that the water appropriated by the plaintiff, as aforesaid, will, when conveyed to said lands through said ditch and flume, supply the needs of the owners of a very large part of the lands now held by private ownership, as well as of such persons as may hereafter become owners of the lands now owned by the government, for water to be used in irrigating crops to be grown on said lands, and for household and domestic consumption and watering live stock, and will lead to the settlement, occupancy and cultivation of a large part of the lands now owned by the government; and that it is the intention of the plaintiff to supply from its said ditch and flume water to all persons, without discrimination other than priority of contract, for the purposes above set forth, so long as it may have water to supply, and upon such terms and for such rates of compensation as may be agreed upon between said persons and the plaintiff; and plaintiff says the use it proposes to make of said water as above set forth is a public use.

"That by reason of the premises, the plaintiff secured on the said twenty-first day of February, a valid right of appropriation of fifty thousand inches of water, by miners' measurement, under a six-inch pressure, from said Umatilla river, and of five thousand inches, by like measurement, from said Wild Horse creek, which appropriations it has ever since held, and now holds in their entirety, and both of which appropriations are prior in time and right to any other appropriation for like purposes, made from said streams, or either of them, or from any tributary of the Umatilla river; nevertheless, the defendants, the Umatilla Improvement Company, the Umatilla Meadows & Butter

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Creek Canal Company, the Columbia Valley Land & Irrigation Company, the Rauch Irrigation Company, the Oliver Ditch Company, the Valley Irrigation Company, and the defendants N. Williams, J. S. Hughes, J. P. Williams, and A. M. Gunn, acting jointly, and the defendants J. H. Rauch, M. V. Rauch, and F. H. Kearney, acting jointly, and the defendant J. A. Marston, by virtue of pretended appropriations of the water of said Umatilla river at points below the plaintiff's points of diversion, each claims and asserts some right to the water of said river in opposition to the rights and the appropriations of this plaintiff.

That the defendant, the Columbia Valley Land and Irrigation Company, also claims and asserts a right adverse to the rights of this plaintiff in the premises as above set forth to the water of Butter creek, a tributary of the Umatilla river, by virtue of an alleged appropriation made of such water; and the defendant, the Blue Mountain Irrigation & Improvement Company, and the defendants Lot Livermore and J. H. Parks, acting jointly, each claims and asserts a right adverse to the said rights of this plaintiff to the water of McKay creek, a tributary of said river, by virtue of an alleged appropriation made of such water.

"That both of said creeks flow into the Umatilla river below the points of diversion of the water appropriated by the plaintiff and below the mouth of Wild Horse creek, and there are on the Umatilla river, below the mouths of both of said creeks, divers persons owning lands lying contiguous to said river, which persons, in regard to said lands, are entitled to the flow of the water of said river in its natural channel in sufficient quantity to supply all their requirements for household and domestic consumption, watering live stock and the irrigation of crops; that if the appropriation of the plaintiff and all the pretended appropriations of the defendants, including the appropriations last mentioned, are allowed to hold good, all the water running in the natural channel of said river will be exhausted before

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it reaches said lands, and it will be necessary for a complete determination of the rights of this plaintiff in the premises to have an adjudication of the validity and priority of its said appropriations with reference to the said alleged appropriations from Butter creek and McKay creek, as well as the other alleged appropriations of the defendant hereinbefore mentioned.

"That it will require a large amount of money, to wit, six hundred thousand dollars, to construct and equip the proposed ditch and flume of the plaintiff, with their appurtenances, and to put the same into operation, and the plaintiff is desirous of raising said sum of money by floating its bonds; that in order to enable it so to do, it is essential that said bonds should be secured by mortgage or lien upon the ditch and flume of the plaintiff and their appurtenances, and upon the right to the water appropriated by the plaintiff, and its franchises in connection therewith; that the plaintiff is now engaged in an effort to float said bonds, but persons who otherwise would take them will not do so on account of the pretended claims of the defendants, as above set forth, nor until the plaintiff establishes its superiority to the water of said Umatilla river and Wild Horse creek to the extent of its appropriations above mentioned; that consequently the pretended claims of the defendants above set forth and the assertion thereof in hostility to the plaintiff's said appropriations, constitute clouds upon the title of the plaintiff to the water by it appropriated from said Umatilla river and said Wild Horse creek, and are subjecting the plaintiff to great and irremediable injury.

"That all the points of the defendants' alleged appropriations lie within Umatilla county, and all ditches, flumes and other appliances and appurtenances, which have been or are being constructed or projected for the purpose of making use of the water pretended to have been appropriated, lie in whole or in part within said county.

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"That the plaintiff is without remedy at law, or otherwise than in a court of equity, where all such matters are properly cognizable and relievable.

"Wherefore plaintiff prays a decree of this honorable court adjudging that the appropriations made by the plaintiff from the Umatilla river above set forth, to the extent of fifty thousand inches of water, by miners' measurement, under a six-inch pressure, and its appropriation from Wild Horse creek, above set forth, to the extent of five thousand inches, by like measurement, are both superior in time and right to any and all appropriations made by the defendants or any of them from the waters of the Umatilla river, Butter creek, or McKay creek; and that the plaintiff may recover from the defendants a judgment for its costs and disbursements herein sustained, and may have such further or other relief as to the court may appear to be just and equitable."

The Umatilla Improvement Company filed an answer denying the material allegations of the complaint, and then pleaded new matter as follows:—

"That it is a private corporation, organized and existing under and by virtue of the laws of the state of Oregon, with its principal office at the town of Pendleton, Umatilla county, Oregon.

"That the enterprise and business for which the defendant was incorporated is, among other things, the construction and maintaining of a ditch and flume for diverting a portion of the waters flowing in the Umatilla river and its tributaries for the purpose of supplying water to the general public, for compensation by way of rental or sale, for irrigation, household and domestic purposes, and watering live stock upon dry lands of the state of Oregon situated in Umatilla and Morrow counties.

"That for the purpose of carrying out its said purposes, the defendant did, on the thirty-first day of October, 1891, select a point for the diversion of said water, said point

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being described as a point on the south bank of the Umatilla river on a magnetic bearing $63^{\circ} 40'$ west of the northeast corner of the northwest quarter of the northwest quarter of section sixteen, township three north, range twenty-nine east, Willamette meridian, and distant therefrom eleven hundred and fifty-seven feet.

"That on said thirty-first day of October, 1891, the defendant caused a notice to be posted at said point of diversion in a conspicuous place and manner, said notice being in writing and setting forth therein the name of the ditch and flume to be constructed and operated by the defendant, and the name of the owner thereof, the point at which the headgate of said ditch and flume was proposed to be located, a general description of the course of said ditch and flume, the size of said ditch and of said flume in width and depth, the number of reservoirs intended to be constructed for use in connection with said ditch and watering live stock upon dry lands of the state of Oregon situated in Umatilla and Morrow counties.

"That for the purpose of carrying out its said purposes, the defendant did, on the thirty-first day of October, 1891, select a point for the diversion of said water, said point being described as a point on the south bank of the Umatilla river, on a magnetic bearing $63^{\circ} 40'$ minutes west of the northeast corner of the northwest quarter of the northwest quarter of section sixteen, township three north, range twenty-nine east, Willamette meridian, and distant therefrom eleven hundred and fifty-seven feet.

"That on said thirty-first day of October, 1891, the defendant caused a notice to be posted at said point of diversion in a conspicuous place and manner, said notice being in writing and setting forth therein the name of the ditch and flume to be constructed and operated by the defendant and the name of the owner thereof, the point at which the headgate of said ditch and flume was proposed to be located, a general description of the course of said

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ditch and flume, the size of said ditch and of said flume in width and depth, the number of reservoirs intended to be constructed for use in connection with said ditch and flume, and that plaintiff thereby appropriated fifty thousand inches, by miners' measurement, under a six inch pressure, of the waters of said river.

"That on the ninth day of November, 1891, the defendant caused a notice in all respects similar to said notice so posted to be filed in the clerk's office of the clerk of Umatilla county, for record, and therewith also filed in said office a map showing the general course of said proposed ditch.

"That under and by virtue of said notice of appropriation, the defendant claims the right to divert at said point fifty thousand inches of water, by miners' measurement, under a six-inch pressure, of the waters flowing in the Umatilla river, which right the defendant claims to be prior in time and superior to any rights claimed by the plaintiff under and by virtue of its pretended notices and appropriations, and prior in time and superior to any of the rights claimed by any of the co-defendants.

"Wherefore this defendant prays for a decree of this honorable court declaring its rights under said notices to be prior in time and superior to the rights of plaintiff and of the co-defendants; that this defendant have judgment against the plaintiff for its costs."

The defendant, the Umatilla Meadows & Butter Creek Canal Company, filed an answer, denying many of the material allegations of the complaint, and then alleged by way of defense the following new matter:—

"That the following named persons, Elvira Teel, O. Teel, J. H. Koontz, M. Allen, M. C. Treble, Henry Baumgardner, T. Nye, Arthur Dillon, John Boyce, and W. W. Caviness, are now, and have been heretofore for a long time past, the owners of lands bordering upon the Umatilla

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river in Umatilla county, Oregon, aggregating in all about five thousand acres of land.

"That the said several persons hereinbefore mentioned and their predecessors settled upon the said lands when the same were public lands of the United States, and have up to the dates and times hereinafter mentioned used the said waters of the Umatilla river in irrigating the said lands and watering stock, and for household and domestic purposes upon the said lands.

"That in September, 1890, the said persons being desirous of constructing one ditch that would supply the said several parties living upon these several tracts of land bordering the Umatilla river near the town of Echo, in Umatilla county, Oregon, did cause to be organized as a corporation this defendant, the Umatilla Meadows & Butter Creek Canal Company.

"That ever since said twelfth day of September, 1890, the said Umatilla Meadows & Butter Creek Canal Company has been and still is a corporation organized and existing under the laws of the state of Oregon, and that all of the stock of said corporation is owned by said persons hereinbefore mentioned.

"That the object and purpose of constructing the ditch hereinafter mentioned was for the purposes of conveying water for irrigation and domestic and household purposes, and for watering stock upon the land of the several persons hereinbefore mentioned bordering upon the said Umatilla river.

"That thereafter, and after the organization of said corporation, this defendant did proceed to cut a ditch, now known as the ditch of the Umatilla Meadows & Butter Creek Canal Company, from the west bank of the Umatilla river, with a capacity of ten thousand inches of water, and did actually divert from the said river, through and by means of said ditch, ten thousand cubic inches of said water, or a proportion thereof, miner's measurement, under

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a six-inch pressure, and convey the same upon the said lands of the said Elvira Teel, O. Teel, J. H. Koontz, M. Allen, M. C. Treble, Henry Baumgardner, T. Nye, Arthur Dillon, John Boyce, and W. W. Caviness, and that said persons received water through said ditch of this defendant, and have used the same for irrigation of their said lands; that the use of said water is necessary in the cultivation of said land; that the same has heretofore during the season of 1890 been used upon said lands of said several persons hereinbefore mentioned for domestic purposes and for watering stock, and for the purpose of irrigating crops thereon.

"That the use of the said waters of the said Umatilla river, and now used through and by means of the said ditch of the Umatilla Meadows & Butter Creek Canal Company, is of great value to the persons hereinbefore mentioned, and that the use of the same is necessary for the cultivation of their said lands, and for irrigation of crops growing thereon, and for household and domestic purposes, and that the said lands of the persons hereinbefore mentioned would be of little value and of no greater value than five dollars per acre without the use of the water, and with the use of the said water the same is worth about forty dollars per acre.

"That all of said parties have crops growing upon their said lands, for the proper cultivation of which said water is necessary.

"That all of the stock of said company is owned by said persons hereinbefore mentioned and said ditch was dug as a private enterprise, and for the individual use of the said persons hereinbefore mentioned; that said appropriation of said water is prior in time and superior in right to any appropriation by plaintiff herein or by any of the defendants in this cause, and that said water, or a proportion thereof, is actually diverted and used by this defendant and the said several persons hereinbefore mentioned in the

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manner hereinbefore alleged, and still is being continued to be used to the extent of ten thousand inches, or a proportion thereof, and that the said use of the water and the said appropriation thereof and the diversion through and by means of said ditch of the Umatilla Meadows & Butter Creek Canal Company in no way affects any rights of this plaintiff, or of any other persons or person upon the said Umatilla river, or of any riparian owner upon said river, or of any other ditch or flume or canal company.

"Wherefore this defendant prays that it may be decreed to be an appropriator prior in time and in right to this plaintiff, or any other of the parties in this suit, of ten thousand inches of the said waters of the Umatilla river by means of said ditch, and to be entitled to take the same by means of said ditch from the said Umatilla river, and use the same for the purposes of irrigating the lands hereinbefore mentioned in the manner in which the same has heretofore been used.

"That defendant may have and recover of and from the plaintiff its costs and disbursements of this suit, and that it may have such other and further relief in the premises as may be agreeable to equity and good conscience and to this honorable court may seem meet."

The Columbia Valley Land Company also filed its answer which, after denying many of the material allegations of the complaint, averred the following new matter:

"And further answering and for a further and separate defense in this suit, this defendant, the Columbia Valley Land & Irrigation Company, avers the fact to be that at all the dates and times herein mentioned this defendant was and still is a corporation, existing under and by virtue of the laws of the state of Oregon, and having its principal office and place of business in the town of Pendleton, Umatilla county, Oregon.

"That the business for which this defendant was incorporated, and in which it is now engaged, is, among other

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things, the construction and maintenance of a ditch and flume for supplying water to the general public for compensation by way of rental or sale for the purpose of irrigation, and for supplying water for household and domestic consumption, and watering live stock upon dry lands of the state of Oregon, situate in Umatilla county.

"That this defendant is and was on the twenty-fourth day of October, 1891, duly authorized and empowered by the laws of the state of Oregon and its articles of incorporation, to appropriate and divert water from the natural channel of the Umatilla river for the purposes aforesaid, and to construct and maintain a ditch and flume for the purpose of carrying water so appropriated to the places where it is to be used, and to construct and maintain dams, reservoirs and feeders for the purposes of appropriation and diversion, and for storing water for future use, and distributing ditches for the purpose of distributing the water appropriated upon the ground where the same is to be used.

"That having been so organized, and being so empowered, and being desirous of diverting water from said Umatilla river, this defendant did, on the 24th day of October, 1891, select a point of diversion of the water of the said Umatilla river, which said point of diversion was and is on the west bank of said Umatilla river at the mouth of Alkali canyon, which point is about three-fourths of a mile in a southerly direction from the railroad station at Echo, Umatilla county, Oregon, and being a point on the west bank of said stream at the point where the water is diverted by the Umatilla Meadows & Butter Creek Canal Company, to the head-gate of said company, as the same is now located, said head-gate being about a hundred feet in a westerly direction from said point of diversion, and said point of diversion being in the northeast quarter of section twenty-one, township three north, range twenty-nine east, of the Willamette meridian, and did on said day post a written notice in a conspicuous place and in plain view at the said

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point of diversion, setting forth therein the name of the ditch intended to be constructed and operated by this defendant, and the name of the owner thereof, and the point at which the head-gate of said ditch and flume was proposed to be located, and a general description of the course of said ditch and flume, and the size of said ditch and flume in width and depth, and the number of reservoirs intended to be constructed for use in connection with the ditch and flume, and the number of cubic inches, miners' measurement, under a six-inch pressure, of water of said river appropriated and intended to be diverted by this defendant, namely, eighty thousand cubic inches of water, miners' measurement, under a six-inch pressure.

"That the course of said ditch and flume, as set forth in said notice generally, with said distributing ditches, reservoirs and feeders, lies wholly within Umatilla county; and within ten days from the posting of said notice, namely, on the second day of November, A. D. 1891, this defendant filed for record in the office of the county clerk of said Umatilla county a copy of said notice, as the same was posted, and at the same time filed for record in said office of the county clerk of Umatilla county, Oregon, a map showing the general route of said ditch and flume.

"That within six months from the date of posting said notice, this defendant commenced the actual construction of its proposed ditch and flume, and since the date of commencement thereof has prosecuted such construction without intermission.

"That the actual capacity of said ditch and flume as the same is now being constructed, is in excess of eighty thousand inches of water, by miners' measurement, under a six-inch pressure, and that this defendant in the construction of said ditch and flume has expended large sums of money, to wit, about the sum of thirty thousand dollars, and has actually built and constructed six miles of said ditch of the capacity aforesaid.

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"That the total amount of water naturally running in the channel of the Umatilla river at the point of diversion by this defendant's ditch and flume during the course of each year varies from eighty thousand to ten thousand inches, miners' measurement, under a six-inch pressure, or thereabout.

"That the course of the ditch and flume intended to be constructed and operated by the defendant has been located and staked out and permanently located, staked out and cross-sectioned, for a distance of sixteen miles or thereabout, and lies wholly across dry, arid lands, situate in Umatilla county, Oregon, and there is no living water upon said lands, save at the points where they are crossed by the said Umatilla river and Butter creek, and the natural rainfall is adequate to supply the needs of persons living upon and owning the same for the purposes of irrigation, household, and domestic consumption, and for watering live stock, and there is no means whereby the necessities of such persons living in such behalf can be satisfied, save by the agency of a ditch carrying water upon the said lands, and there is no source of supply for the said ditch save the streams aforesaid.

"That along the line of defendant's ditch and flume as the same has been surveyed and located, there is a great tract of agricultural land, numbering about two hundred thousand acres, capable of being supplied by water from said ditch and flume, which with the application of water will become very productive and valuable, and will sustain a large population and live animals, but without water as the same now are, said lands are unproductive and of little value.

"That in their present condition said lands are not worth more than twenty-five cents per acre, and with water thereon from the ditch and flume of this defendant, will be of the value of forty dollars per acre.

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"That said lands are in part owned by the government of the United States.

"That more than half of said amount is held by the government of the United States, and has not been occupied or cultivated by reason of the arid character of the lands and the want of water, and if water is brought thereon in the manner in which this defendant now seeks to conduct the same through its said ditch and flume, said lands will be rapidly settled up and occupied and brought under cultivation, and that it is the intention of the defendant to supply from its ditch and flume water without discrimination other than priority of contract, for the purposes of irrigation, watering live stock, household and domestic consumption, to persons owning or occupying said lands so long as it may have water to supply, and upon such terms and for such rate of compensation as may be agreed upon between said persons and this defendant, and that said use of said water for said purposes is a public use.

"That by reason of the premises, this defendant on the twenty-fourth day of October, 1891, secured a valid right of appropriation of eighty thousand inches of the water of said Umatilla river, by miners' measurement, under a six-inch pressure, which said appropriation it has ever since held and now holds in its entirety, and which said appropriation is superior in right and prior in time to any valid appropriation or any appropriation by the plaintiff herein, or any of the defendants herein, for like purposes made from said Umatilla river.

"That if the pretended appropriation of plaintiff or any of the pretended appropriations of the defendants herein are allowed to hold good, all the water running in the natural channel of said Umatilla river will be exhausted before it reaches the point of diversion of defendant's said ditch and flume on said Umatilla river."

Another separate defense substantially alleged that the plaintiff's alleged appropriation was not made in good faith

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for the purpose of constructing the ditch or flume mentioned, or any ditch or flume, but for the purpose of speculation, by selling and floating bonds upon the market; that since said alleged appropriation, the plaintiff has failed to commence and carry on its work in good faith, and has not constructed any part of said ditch or flume; and said appropriations and locations made by the plaintiff were made for the purpose of fraudulently obstructing and interfering with the rights of this defendant and other defendants in this suit and riparian owners along the bank of the Umatilla river, and not for the appropriation of the waters of Umatilla river to public useful purposes; that plaintiff has not performed any work upon the line of said ditch pretended to have been located by it, to exceed in value the sum of one hundred dollars; and prior to the expiration of the six months limited by law for performing work on said ditch, had not performed work thereon to the amount of five dollars.

"Wherefore, this defendant prays that it may be decreed to be a prior appropriator of the waters of the Umatilla river at the point of diversion set forth in this answer to the extent of eighty thousand inches thereof, prior and superior in time and right to any claim or appropriation by the plaintiff or any of the defendants herein, and that the appropriation of the defendant from the Umatilla river above set forth to the extent of said eighty thousand inches, by miner's measurement, under a six-inch pressure, be decreed superior in time and right to any and all appropriations made by the plaintiff or defendants herein, or any of them, either to the waters of the Umatilla river, Butter creek, McKay creek, or Wild Horse creek, and that defendant may have and recover of and from the plaintiff its costs and disbursements in this suit, and that defendant may have such other relief," etc.

The new matter in each of these answers was denied by the replies filed and evidence duly taken.

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Cox, Teal & Minor, for Respondent.

J. C. Leasure, R. J. Slater, and Bailey & Balleray, for Appellants.

STRAHAN, C. J.—This is not a suit to determine an adverse claim to real property, within the meaning of section 504, Hill's Code. That section provides: "Any person in possession by himself or his tenant of real property, may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest." The slightest reference to this section is sufficient to show that the jurisdiction which the plaintiff invokes is not conferred by it. If a court of equity has the jurisdiction which was assumed in this case, it is not conferred by statute, but exists, if at all, as a part of the general equity jurisdiction.

It will be observed that the plaintiff nowhere claims that either of the defendants has at any time or in any manner interfered with its alleged rights to the water which it claims. The plaintiff shows that it incorporated, and filed sundry notices of its claim and maps, and did a very little work. The defendants did the same, though one of the defendants has perhaps done more work and expended a larger amount of money than has the plaintiff. In several parts of its complaint, the plaintiff alleges facts upon which it relies as reasons for equity assuming jurisdiction. This, for instance: "That if the appropriation of the plaintiff and all the pretended appropriations of the defendants, including the appropriations last mentioned, are allowed to hold good, all the water running in the natural channel of said river will be exhausted before it reaches said lands, and it will be necessary for a complete determination of the rights of this plaintiff in the premises to have an adjudication of the validity and priority of its appropriations with reference to the said alleged appro-

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priations from Butter Creek and McKay Creek, as well as the alleged appropriations of the defendants hereinbefore mentioned." It is then alleged that it will require six hundred thousand dollars to construct and equip said ditch and put the same in operation, and that the plaintiff is desirous of raising the same by floating bonds; that in order to enable it to do so, it is essential that the said bonds should be secured by mortgage or lien upon the ditch and flume of the plaintiff and their appurtenances, and upon the right of the water appropriated by the plaintiff and its franchises connected therewith; that the plaintiff is now engaged in an effort to float said bonds; but persons who otherwise would take them will not do so on account of the pretended claims of the defendants above set forth, nor until the plaintiff establishes its superior right to the waters of said Umatilla river and Wild Horse creek to the extent of its appropriations above mentioned; that consequently the pretended claims of the defendant, above set forth, and the assertion thereof in hostility to the plaintiff's said appropriations, constitute clouds upon the title of the plaintiff to the water by it appropriated from said Umatilla river and Wild Horse creek, and are subjecting the plaintiff to great and irremediable injury.

The plain inference from all of this is that the plaintiff claims to have acquired a first right to this water, and wishes to put it in a ditch and flume, to be used for the purposes of irrigation by whoever will buy it; that it has not money enough to do the work without selling bonds, but that as long as the defendants are claiming to take a large amount of water from the same supply below the plaintiff's point of diversion, no one will buy said bonds. In effect, this court is asked to certify that the plaintiff owns the water which it claims, for the purpose of enabling it to make sale of its bonds; at least, this seems to be the clear logic of the position. All of the rights claimed by the plaintiff or either of the defendants are, as yet, only evi-

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denced by notices and maps; not a drop of water has been diverted. If the plaintiff has acquired a legal right to take the water from the streams mentioned, there is nothing to prevent its doing so, at least so far as this record discloses. If, in the development of its project, any person should wrongfully interfere with water to which it might then be able to show itself entitled, no doubt a court of equity would, upon a proper showing, restrain such interference; but as yet nothing comparatively has been done by the plaintiff, and the defendants have in no manner disturbed it in the exercise of any of its rights or franchises. The plaintiff may never construct a ditch or flume; and if it did, and is entitled to the water, it is not to be presumed or intended that the defendants would violate the plaintiff's rights; at least, if it is of the opinion that the defendants intend to do so, it must wait for some overt act that injures it. An intent not acted upon is not actionable. Much of the plaintiff's contention was devoted to the various notices filed by it and placed of record with the county clerk.

In the view taken of this case, it is unnecessary to consider the effect of these several notices; but it may not be improper to remark that the statute under which the proceedings of the plaintiff, as well as the defendants, were taken, is one requiring a strict construction; and whatever rights either party acquires under it must be done by a strict compliance with its terms. No favorable intendment or liberal construction can be tolerated in the enforcement of such a statute. (*Watson v. Acquackanonck Water Co.* 36 N. J. L. 295; *Central R. R. Co. v. Hudson Terminal Co.* 46 N. J. L. 289; *Cox v. Tipton*, 18 Mo. App. 450; *Sugar Refining Co. v. St. Louis Grain Elevator Co.* 82 Mo. 121; *Chicago etc. R. R. Co. v. Wiltse*, 116 Ill. 449; *The Miami Coal Co. v. Wigton*, 19 Ohio St. 560; *Alabama etc. R. R. Co. v. Gilbert*, 71 Ga. 591; *Sharp v. Speir*, 4 Hill, 76; *Ball v. Lastinger*, 71 Ga. 678; *Bensley v. Mountain Lake Water Co.* 13 Cal. 306; 73 Am. Dec. 575; *Bloom v. Burdick*, 1 Hill, 130; 37 Am. Dec. 299; *In re Water Comrs.* 96 N. Y. 351; *Keller v. Corpus Christi*, 50 Tex. 614; 32

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Am. Rep. 613; *Dent v. Ross*, 52 Miss. 188; *Lombard v. Whiting*, Walker (Miss.), 229; *Willard v. Fralick*, 31 Mich. 431.)

Further discussion seems to be unnecessary. The plaintiff has failed to bring itself within any principle of equity jurisdiction which would enable a court of equity to consider or pass upon the supposed rights alleged in its complaint, and the counter-claims pleaded by several of the defendants must fail for the same reasons. Within what we conceive to be the well-established doctrines of equity, neither party has as yet done anything to invite or justify equitable interposition.

Entertaining these views, we must reverse the decree and dismiss the suit.

[Filed June 9, 1892.]

THE UMATILLA IRRIGATION CO. v. JEREMIAH
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PRACTICE ON APPEAL—ADDITIONAL FINDINGS OF FACT.—Unless it appear by the bill of exceptions that application was made to the court below for different or additional findings, and refused, any complaint in the supreme court in regard to findings of fact appearing in the record, presents no question for review on appeal.

CONSTITUTIONAL LAW—LEGISLATIVE DECLARATION OF FACT.—The legislature having, by the terms of an act, made a declaration of fact which is necessary to authorize the proposed legislation, the courts will not question such a declaration, or pronounce the law invalid on account thereof, unless it plainly violates the constitution.

Umatilla county: JAMES A. FEE, Judge.

Defendants appeal. Affirmed.

This is an action to condemn the riparian rights of the appellants in a portion of the waters of Umatilla river under the provisions of the act of the legislative assembly, passed at the session in 1891. (Laws, 1891, 52.) The action was tried by the court without the intervention of a jury. The only evidence used upon the trial, so far as appears,

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was an agreement signed by the attorneys of the parties reciting that certain facts were admitted to be true. To that statement was attached sundry exhibits, marked respectively from A to I inclusive. The court found the facts substantially as recited in the stipulation, but no allusion was made to the exhibits. There was no bill of exceptions.

H. J. Beam, for Appellants.

Cox, Teal & Minor, for Respondents.

STRAHAN, C. J.—The notice of appeal contains twelve assignments of error. All of them, except the sixth, relate entirely to the action of the court upon the trial either in finding or in failing to find certain facts. There was no request to find other than as appears, and no exceptions were taken to the action of the court, either in finding or in refusing to find. The stipulation as to the facts does not take the place of a bill of exceptions. If the court did not find the facts as fully as is recited in the stipulation, the appellants might have moved for additional findings; and if these were refused, they could have included enough in the bill of exceptions to show the error of the court, and then reviewed the ruling on this appeal. But the appellants did none of these things, and therefore these assignments present no question for review.

The sixth assignment of error presents an important question demanding notice. The same is as follows: "The said honorable circuit court erred in finding as conclusions of law as follows, viz: that the plaintiff is entitled to condemn and appropriate as against the defendants all the water of the Umatilla river, as the same flows over the lands of the defendants hereinbefore described, over and above ten inches, by miner's measurement, under a six-inch pressure, to be left running in the channel of said river across said lands for the purpose of supplying the defendants with water for household and domestic purposes, and watering live stock on said lands."

Section 2 of the act of 1891, (Laws, 1891, 52,) authorizes a corporation organized for certain purposes to condemn rights of way, and the rights of riparian proprietors upon lakes or streams, etc. It is sufficient to say that the facts found show that the plaintiff is within the terms of the act. Section 7 of said act, among other things, makes title 3 of chapter 32 of the miscellaneous laws of Oregon apply to and govern proceedings for condemnation under this act.

Section 8 of said act is as follows: "Such corporation may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location. Such actions shall be brought in the county where the lands to be affected, or some portion thereof, are situated, and the manner of procedure therein shall be similar to that prescribed in the preceding section for condemnation of lands; but no person owning lands lying contiguous to any stream shall, without his consent, be deprived of water for household or domestic use, or for the purpose of watering his stock, or of water necessary to irrigate crops growing upon such lands and actually used therefor." The first section of the act expressly declares that the use of the waters of this state, for the purposes specified in the act, is a public use, and the right to collect rates or compensation for such use of said water is a franchise. The legislature has the sole power to determine when and in what cases the power of eminent domain may be exercised, and private property taken subject only to two limitations; one is, that it cannot be taken for private use, and the other is, that compensation must be made before it is taken, unless in case of the state. The legislature having declared the use of water for the purposes named in the act to be a public use, this court cannot, from anything that appears in this case, say that declaration is not true. There are,

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however, examples to be found in the books where the courts have interfered, and declared acts of the legislature violative of the constitution, because they plainly undertook to appropriate the property of the citizen to private and not to public uses; but to enable the court to do so, the case must be free from doubt. We cannot say from the facts before us that this case is of that character. It is well known that there are extensive tracts of arid land in Eastern Oregon, unproductive and almost worthless without irrigation, but which could be made productive by the use of water. The reclamation of this class of lands is the object of the act in question; and we cannot say that it is a misapplication of the power of eminent domain to accomplish such results. Doubtless, in some instances, it may be the means of causing riparian owners much inconvenience and expense, and even loss, but these are some of the occasional consequences of such a law; but generally juries may be trusted in these matters. Their knowledge of such affairs will usually enable them to put a proper estimate upon the value of the interests which may be taken under the law and of the damages which the taking inflicts. To take from the farmers along the Umatilla river the water which has made their lands so very productive, is almost equivalent to the taking of all the lands affected by the water.

We cannot reverse this judgment without overturning the act of the legislature under which the proceedings were taken, and we do not see our way clear to do this. The act is one that affects large property interests, the policy and scope of which may be of doubtful utility, but these are not enough to enable us to overthrow it. Before we could do that, it must plainly contravene some provision of the organic law, and we cannot find that it does. Still, it is an act the execution of which must be closely scrutinized by the courts, and all of its provisions construed strictly.

Argument of counsel.

Whoever claims anything by virtue of it must bring himself clearly within its terms.

Finding no error in the judgment appealed from, the same is affirmed.

[Filed June 18, 1892.]

O. & C. R. R. CO. v. E. M. CROISAN.

STATE BOARD OF EQUALIZATION—CLASSIFICATION OF REAL PROPERTY.—Under the law of this state, there are, for the purposes of assessment and taxation, but three kinds of real property; by this classification the state board of equalization is bound, and cannot, either on the basis of present ownership, source of title, or otherwise, change the same so as to add new kinds or increase the assessments of individuals or classes of people holding lands of the kinds thus invented.

Marion county: R. P. BOISE, Judge.

Plaintiff appeals. Reversed.

W. D. Fenton, for Appellant.

The act is void for uncertainty in that it makes no provisions: (a) for the delivery to the state board of equalization of the various assessment rolls sent up by the county clerks to the secretary of state; (b) for the state board of equalization to alter, add to, or correct these rolls, or to return them to the secretary of state; (c) for the governor, secretary of state, and treasurer to recognize the action of the state board of equalization in reference to fixing the state tax. (2 Hill's Code, §§ 2789, 2799.)

The act in question is void, because there is no provision in relation to notice to the taxpayer, or to the county as an aggregate body, unless it be deemed notice where the statute fixes a day and place certain upon and at which the board convenes. This at best is constructive notice, is insufficient, and is not due process of law, unless the right to a hearing is expressly provided. This is not done. (Cooley Taxation, 2 ed. 361-366; *Stuart v. Palmer*, 74 N. Y. 183; 30 Am. Rep. 289; *San Mateo Co. v. S. P. R. R. Co.* 13 Fed. Rep. 722; S. C. 8 Saw.

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22	393
33	136
33	142
22	393
38	602

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238; *Santa Clara Co. v. S. P. R. R. Co.* 18 Fed. Rep. 335; *Albany City Bank v. Maher*, 20 Blatch. 341; *McMillen v. Anderson*, 95 U. S. 37; *Hagar v. Reclamation Dist.* 111 U. S. 701; *Blake v. People*, 109 Ill. 504; *Cahoon v. Coe*, 57 N. H. 556; *Davidson v. New Orleans*, 96 U. S. 104; 36 N. J. L. 70.)

The action of the board is void, because there was no power in the board under the act to classify real estate. This is a legislative function. (Laws, 1891, 183; 2 Hill's Code, §§ 2729-2776.)

The act is the mode and measure of power, and the board must find express warrant therein for its action. (*People v. Lathrop*, 3 Col. 428; *Gatchell v. Supervisors*, 51 Iowa, 107; *McKee v. Supervisors*, 53 Ill. 478; *People v. Nichols*, 49 Ill. 519; *Orr v. State Board*, Idaho, Dec. 12, 1891, 28 Pac. Rep. 416; *Burroughs Tax*. § 101; *Hamilton v. State*, 3 Ind. 452; *Suth. Stat. Const.* § 362; *Cooley, Tax*. 199; *Cooley, Const. Lim.* 641; *Endlich, Interp. Stat.* § 345; *Wells, Fargo & Co. v. Board of Equalization*, 56 Cal. 197.)

The act is void, because it was not passed in conformity with section 19, article 4, of the constitution, as affirmatively appears from the house journal. Two thirds of the house did not vote in favor of dispensing with the requirements of the provisions of our constitution. (House Journal, 1891, 966.)

The act, if valid, merely authorized the board to equalize values as returned, and the aggregate of the state could not be increased. The power to assess is lodged in the county assessors and county boards. If the board may increase it fourteen million dollars, they may increase it by any sum, and thus become a tribunal with authority to assess instead of equalizing. (*People v. Lathrop*, 3 Col. 428.)

The act is a revenue law; and this is particularly true if the board may increase the aggregate value of the state's assessment, thus practically increasing or decreasing the public revenue. (*Mumford v. Sewall*, 11 Or. 71; 50 Am. Rep. 462; *State Const.* art. 9; art. 4, sec. 18.)

Argument of counsel.

Geo. H. Williams and Raleigh Stott, for Multnomah county.

Where summary proceedings are authorized by statute, the effect of which is to divest or to affect rights of property, the rule holds good that the statute is to be strictly construed. The power conferred must be executed precisely as it is given, and any departure will vitiate the whole proceeding. It is indeed a general rule that all statutes conferring special ministerial authority by which any man's estate may be affected, must be strictly pursued. (Sedg. Stat. Const. 302; Cooley, Taxation, 209, 290; *State v. Hopper*, N. J. March 26, 1892, 23 Atl. Rep. 948.)

Another rule is, that all proceedings for the collection of a tax, from their inception to their end, must be in strict conformity with the requirements of the statute under which they are taken, otherwise they will be void; and tax titles are constantly overthrown by the courts in all parts of the country for technical defects or technical departures from the statute under which they originated. (*Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *Parker v. Overman*, 18 How. 137; *Martin v. Barbour*, 34 Fed. Rep. 701.)

If the state board of equalization had a right under the act of its creation to raise the state revenues by adding to the assessments made by the county authorities, said act is unconstitutional, as it originated in the senate, and is, in effect, a bill for raising revenue. If, on the other hand, the board had no right to increase the state revenues, under the act of its creation, then, in increasing the assessments in the manner it did, it exceeded its authority, and its acts are void. (*McKee v. Supervisors*, 53 Ill. 477.)

The board of equalization had no authority to divide real property into different or distinct classes, and raise or lower the valuation of real estate by said classes. (*Knowlton v. Supervisors*, 9 Wis. 410.)

Moreover, assessment and taxation are to be predicated upon a just valuation, and cannot be lawfully based upon

Argument of counsel.

any arbitrary arrangement or classification of property which has no reference to its valuation. (*Cummings v. National Bank*, 101 U.S. 153; *Dundee Mortgage Co. v. Parrish*, 24 Fed. Rep. 197; *First National Bank v. Treasurer*, 25 Fed. Rep. 749.)

There is in this tabulated statement of the board of equalization such a discrimination between different kinds of property, evidently with reference to ownership, as to make the proceedings of the board of equalization invalid. (*C. O. Land Co. v. Gowen*, 48 Fed. Rep. 722.)

When a law creating a board of equalization provides that it may add to the assessment roll such property as has been omitted by the owner or assessor, but fails to provide that personal notice shall be given the owner of the time or place that the board will make or contemplates making additions to the assessment roll, personal notice must be given to the owner of the property before such assessment will be legal. (*Avant v. Flynn*, S. Dak. May 28, 1891, 49 N. W. Rep. 15; *Orr v. State Board Equalization*, Idaho, Dec. 12, 1891, 28 Pac. Rep. 416; *Sioux City R. R. Co. v. Washington Co.* 3 Neb. 30; *Barnes v. Hasleton*, 50 Ill. 429; *Cooley*, Tax. 256; *R. R. Tax Cas.* 13 Fed. Rep. 751; *O. S. N. Co. v. Wasco Co.* 2 Or. 206; *Patten v. Green*, 13 Cal. 329; *Stuart v. Palmer*, 74 N. Y. 186; 30 Am. Rep. 289.)

Where there is an interdependency of one portion of a statute upon another, and the holding of the one part of the statute would necessarily affect the operation of all other parts of the same statute, then a fatal defect in one part is fatal to the whole statute. (*Santa Clara v. R. R. Co.* 118 U. S. 394; *People v. Lathrop*, 3 Col. 466.)

George E. Chamberlain, attorney-general, and *George G. Bingham*, district attorney, for Respondent.

The state board of equalization has power to add to the assessment of the appellant's property, as well as to increase or decrease the valuation of any other kind of property. (*Braden v. Union Trust Co.* 25 Kan. 362; *Russell v. Carlisle*, Ky. Apr. 5, 1888,

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8 S. W. Rep. 14; *Wells Fargo & Co. v. Board Equalization*, 56 Cal. 194; *People v. Dunn*, 59 Cal. 328.)

It has been repeatedly held that the action of a state board of equalization, in raising the assessment of a county or district, need not give notice to the individuals who will be affected. The law fixing the time and place of meeting is sufficient notice to parties interested. (*State Railroad Tax Cases*, 2 Otto, 575; *State ex rel. v. New Lindell Hotel Co.* 9 Mo. App. 450; *Dundy v. Comrs.* 8 Neb. 508; *Spaulding v. Hill*, 7 S. W. Rep. 27.)

BEAN, J.—This is a suit against Marion county and its sheriff to perpetually enjoin the collection of a certain delinquent tax, claimed by plaintiff to be illegal, and comes here on appeal from a decree sustaining a demurrer to the complaint. For the purposes of this appeal, it is only necessary to state that the complaint avers that the value of plaintiff's property in Marion county, for the year 1891, including congressional grant, roadbed or track, depot grounds, town and city property, and rolling stock, as listed, described, and assessed by the county assessor, and approved by the county board of equalization, amounted in the aggregate to \$348,927. This property was classified, entered, and described on the county assessment roll, under appropriate heads, as town and city property, other real estate, which included congressional grant and roadbed, and rolling stock. The state board of equalization, created by and acting under the provisions of the act of February 21, 1891, (Laws, 1891, 182,) at its session in December of that year, divided and classified the real property of the state, appearing on the assessment rolls of the several counties, into railroad lands, wagon-road lands, swamp lands, agricultural, and other lands not included in the former classifications, city and town property, railroad track, telegraph lines, and mortgages, and proceeded to ascertain and determine the rate per centum to be added to

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or deducted from the assessed value of each class so adopted in the several counties in the state, combining the result of their work in one table, as by law provided. From this table and the complaint it appears that the portion of the congressional grant of plaintiff in Marion county, still owned by it, was classified as railroad land, and the assessed value thereof increased about fifty per cent; that its roadbed was divided into main line and branch line, and the assessed value of the main line increased forty-two per cent, no change being made in the value of the branch line, and the value of the rolling stock decreased ten per cent. The value of all city and town property in the county was increased ten per cent. The effect of this action of the state board was to increase the taxes of plaintiff in Marion county in the sum of \$1,589.69, to enjoin the collection of which this suit is brought.

Several objections are urged by plaintiff to the validity of the action of the state board of equalization in increasing the valuation of its property, but the principal objection is, that it had no authority to divide real property into distinct or different classes and raise or lower the valuation of real estate by said classes; and to this question we shall devote our attention. The act of 1891 creates a state board of equalization, consisting of one member from each judicial district, each of whom, before entering upon the discharge of his duties, shall take an oath to the effect "that he will equalize all the property, both real and personal, as enumerated upon the equalized county assessment rolls of the several counties of the state." It is made the duty of the secretary of the board to compile abstracts of assessment rolls received from the various counties into tabular statements for the use of the board. In equalizing the valuation of property as assessed in the different counties, the board shall consider real and personal property separately, and add to or deduct from the aggregate valuation of the real and several classes of personal property of

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every county which they believe to be valued below or above the true and fair value thereof, in money, such per centum in each case as will bring the same to its true and fair value in money, but shall not reduce or increase the aggregate valuations except in such amount as may be reasonably necessary to a just equalization. The result of the work of the board shall be combined in one table, and the chairman and secretary shall certify to the secretary of state the rate per cent to be added to or deducted from the assessed valuation of each class of property in the several counties, who shall, within five days, report the action of the board to the several county clerks; and it is made the duty of the respective county clerks to add to or deduct from each tract or lot of real property in his county the required per centum on the valuation thereof as it stands after the same has been equalized by the county court, and shall also add to or deduct from such class of personal property in his county the required per centum on the valuation thereof as it stands after the same has been equalized by the county court.

The manifest object and intent of this law are to secure justice and equity in the valuation of the several kinds and classes of taxable property as between the several counties. It is not designed, nor is the board authorized or empowered, to equalize or correct errors in the assessments of individual taxpayers. No such power or authority is conferred upon it by law. The valuation of the property of individual taxpayers by the assessor is conclusive upon boards of review, except as the statute may otherwise provide, and such boards cannot change individual assessments unless expressly empowered to do so. (Cooley on Taxation, 419; Desty on Taxation, 496; *Getchell v. Supervisors*, 51 Iowa, 107; *People v. Nichols*, 49 Ill. 517; *McConkey v. Smith*, 73 Ill. 313.) The only tribunals known to the law authorized to change individual assessments are the county board of equalization and the county court. (Hill's Code, §§ 2778-

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2782.) After such equalization by the county boards, uniformity in the assessment is supposed to have been secured as between individuals of the county, and it is then for the state board to secure uniformity between the counties. This is not to be done by changing individual assessments, or by adopting some classification unknown to the law, but by adding to or deducting from the aggregate valuations of the several classes of property, as enumerated upon the assessment rolls, such per centum as may be necessary for that purpose, thereby affecting all property of a given class alike. The state board of equalization is bound by the classification of property for the purposes of assessment and taxation made by law and appearing upon the assessment rolls. It has no authority to change the assessment rolls or the classification of property as indicated thereon. The only power it has over the rolls is to ascertain if the valuation of the several classes of property in one county bears a just relation to the valuation of like classes in the other counties; and if it do not, the board can increase or diminish the aggregate valuations. (*Desty on Taxation*, 496; *Va. & Tenn. R. R. Co. v. Washington Co.* 30 Gratt. 471; *People v. Nichols*, 49 Ill. 517.)

By the law of this state, for the purposes of assessment and taxation, there are only three classes of real property. First, city, village, or town property, which, if divided into lots and blocks, shall be separately described on the assessment roll (*Code*, §§ 2770, 2771); second, mortgages, deeds of trust, contracts or obligations whereby land situated in no more than one county is made security for the payment of a debt, together with such debt, which, for the purpose of assessment and taxation, are deemed and treated as land or real property, (section 2730,) abstracts of which are required to be furnished the assessor by the county clerk, and are separately assessed; and, third, all other real property, which is to be described by legal subdivisions, or in such other manner as to make the description certain.

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(§§ 2770, 2773.) To the latter class belongs the land held by the plaintiff, under congressional grant, and all other land not included in the city, village, or town class, as well as its roadbed or track. This is the only classification of real property known to the law, and the only one the state board is authorized or empowered to adopt or consider. It cannot subdivide these classes into other or different classes, by reason of the source of title or present ownership. The classification of property for the purposes of assessment and taxation is a legislative function, and the assessors and boards of equalization are bound by the classification made by the legislature. (Desty on Taxation, 96.) Railroad lands, wagon-road lands, swamp lands, railroad tracks, and telegraph lines, are required to be assessed as other real property of like kind and value; and when so assessed by the county assessor and board of equalization, the state board is not authorized to change the specific assessment. It may add to or deduct from the aggregate valuation of the class to which these lands belong a certain per centum, if necessary to equalize such valuation as between the counties, but it has no power to change the individual assessment, or adopt a classification based solely upon the present ownership or source of title. If it may adopt a classification based upon present ownership, and add to the county valuation thereof a different rate per cent from that added to other property of the same kind, it may treat the property of every individual taxpayer in the same way, and thereby increase the individual assessment without notice to the taxpayer, and in violation of the constitutional provision which requires a uniform and equal rate of assessment and taxation. If it may classify real property with reference to the source of title, its action affects certain taxpayers because of their title, and not on account of the value or character of land. It is not clear upon what basis the classification of real property, other than railroad track and telegraph lines, was made by the board, whether from

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the present ownership or source of title. If by railroad lands, the board means lands within grants of congress to aid in the construction of railroads; and by wagon-road lands, such as were granted to the state for wagon-road purposes; and by swamp lands, such as are within the swamp land grant, then it would follow that, by the action of the board, a corporation or individual owning land in Marion county within a railroad grant would have sixty per cent added to the assessed value; the owner of land within a wagon-road grant in Klamath county would have one hundred per cent added to the assessed value; and the owner of swamp land in Harney county would have three hundred per cent added to the assessed value, because it is railroad land, wagon-road land, or swamp land; while a corporation or individual owning the same quantity, quality, and character of adjoining land, purchased from the government or state, or taken under the homestead or preëmption laws, would have only seven per cent added in Marion county, and nothing in either of the other counties, although the two tracts of land are of the same value, and presumed so assessed by the county assessor and board of equalization.

If, however, as seems more probable from the tabulated statement of the board, the classification is made with reference solely to present ownership, it is an indirect way of increasing the assessment of individual taxpayers without any authority of law for so doing. If the state board can so increase the assessment of one taxpayer, it can do the same with any and every taxpayer in the state by simply classifying his land as Jones' land or Smith's land, as the case may be, and that without regard to, and irrespective of, any action of the county board of equalization, and without notice to the taxpayer. No such extraordinary power was ever contemplated by the law or conferred by the legislature. An acre of railroad land, wagon-road land, or swamp land, is of no more value on account of the

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source of title or present ownership than the same quantity and quality of land belonging to another person and held by a different title; nor under the law is there any difference in the mode of its assessment, assessable value, or description on the assessment roll.

There is but one rule for the assessment of real property; and uniformity in the assessment of each of the three classes as between the individual taxpayers is supposed to have been secured by the assessor and county board of equalization, and the only power of the state board is to secure uniformity in the valuation of these classes as between the counties. The attempt of the board, as is apparent from its tabulated statement, to assess the track-age of the several railroads in the state by name, is so obviously an exercise of the power of assessment and not of equalization as to be manifestly unauthorized and void; and if sustained, would empower the board to arbitrarily assess by name any and every taxpayer in the state if it thought proper. A doctrine so startling and fraught with such consequences cannot receive our assent.

It is claimed that the state board, in equalizing the valuation of property as assessed in the different counties, must consider all real property as one class, and not in the three classes made by law, and carried out on the assessment roll. There is language in the law creating the board which tends to support such an inference, yet we do not think the legislature intended thus to restrict their powers. The words "shall consider real estate, including town and city lots, and personal property, separately," and "shall add to the aggregate valuations of the real, and several kinds or classes of personal property, in every county, which they believe to be valued below its true and fair value, such per centum in each case as will bring the same to its true and fair value in money," must be understood as referring rather to the object and purpose of the law than as defining and limiting the extent of the powers

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of the board. To say that the act creating the state board of equalization is a piece of hasty and crude legislation, is to say what is obvious; but laws of this kind are remedial in their character, intended to correct an admitted evil by requiring each county to pay its just proportion of the burden of maintaining the state government, to suppress wrong, and promote the public good, and should be liberally construed "so as to bring under their operation," says Mr. Endlich, "as well that which is within their meaning as that which is within their letter." (Endlich Interp. Stat. 346.) And when the act in question is so construed, in connection with the provisions of the assessment law to which it relates, we think it manifest the board has power to revise and equalize the aggregate valuation of the several classes of real property authorized by law and enumerated upon the assessment rolls; and so far as it confined its action to such classifications, its acts are valid; but in attempting to divide real property into other classifications, and add a different rate per cent to these classes on account of the manner in which they are designated, its acts were not authorized by law, and are void.

It is also claimed that the action of the state board is in violation of the constitutional provision requiring a uniform and equal rate of assessment and taxation, because the tabulated statement of the board shows that all mortgages in the state are assessed at their full value, while it is contended other real estate is not assessed at more than one-half its real value, and, therefore, there is a "discrimination against the owners of mortgages, and in favor of the owners of other real estate, properly so called, especially agricultural lands." This argument not only assumes the existence of a state of facts not in this record, but also assumes that every assessor and county board of equalization in the state have violated the law they are sworn to obey, which requires all real property to be assessed at its true cash value, which shall be held and taken to mean

the amount such property would sell for at a voluntary sale made in the ordinary course of business, and not what it would bring at public auction or forced sale. (Code, § 2752.) Certainly, before a court can reach such a conclusion, and determine that real estate is not assessed at more than half its value, or at any sum less than its cash value, there should be some allegation and proof of the facts.

It was contended by counsel for Multnomah county that the state board, consisting of the governor, secretary of state, and state treasurer, is to take the abstracts of the assessment rolls, certified by the county clerks of the several counties, and not the tabulated statement of the state board of equalization, as a basis upon which to levy the state tax and apportion the same among the several counties. There are no allegations in the complaint upon which this contention can arise, and nothing to indicate the basis upon which the state board proceeded in making the state levy, and therefore, although it is difficult to conceive that a county or taxpayer could refuse to pay the state tax, for the reason suggested it would be *obiter* for us to undertake to decide the question in this case.

There are some other objections suggested in the brief, but they were not pressed at the argument; and after examination, we do not deem them of sufficient importance to require any further notice.

We conclude, therefore, that the action of the state board by which it increased the county valuation of the roadbed, or track and lands of plaintiff, not included in the classification of city, village, or town property, is void and of no effect; but that the per centum added by the board to the assessed value of city, village, or town property must be added to plaintiff's property in Marion county belonging to such class, and the taxes caused thereby paid, before the injunction can be made perpetual.

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The complaint not being clear upon this matter, the decree of the court below must be reversed, and the cause remanded to ascertain such amount.

[Filed June 18, 1892]

CHARLES P. KELLOGG & CO. v. D. H. MILLER.

ASSIGNMENTS—SECURED CLAIMS—DIVIDENDS.—A creditor whose claim is secured by mortgage may prove the entire claim against the estate of an insolvent debtor, and receive from the assignee a dividend accordingly, like other creditors, irrespective of his security, because the courts will not disturb the contractual relations assumed in good faith by the debtor and creditor.

Jackson county: L. R. WEBSTER, Judge.

Defendant appeals. Affirmed.

Willard Crawford, and *Sanderson Reed*, for Appellant.

Francis Fitch, and *C. J. MacDougall*, for Respondents.

BEAN, J.—On July 29, 1890, C. J. Kurth and John W. Miller, partners doing business under the firm name of Kurth & Miller, being insolvent, made a general assignment of all their property to appellant D. H. Miller for the benefit of their creditors. At the time of the assignment, Kurth & Miller were indebted to respondents Charles P. Kellogg & Co. in the sum of one thousand four hundred and forty-eight dollars and ninety cents on a promissory note, for goods, wares, and merchandise, which indebtedness was secured by a mortgage upon certain real property of the probable value of eight hundred dollars. Within the sixty days allowed by law, Kellogg & Co. presented to the assignee their claim, duly verified, for one thousand four hundred and forty-eight dollars and ninety cents, being the full amount thereof; and on September 13, 1891, the assignee having converted into money all the property of the estate of Kurth & Miller, except the mortgaged prem-

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ises, the circuit court of Jackson county, in a proper proceeding, ordered and adjudged that the assignee pay to all the creditors of the estate, including Kellogg & Co., *pro rata*, according to the amount of their respective claims, from which order this appeal is taken. The only point raised by, and to be decided on, this appeal, is whether a creditor of an estate in the hands of an assignee under the general assignment law, whose claim is secured or partially secured by a mortgage on real property, is entitled to a dividend on the face of such claim without regard to the value of the mortgaged property; or whether such creditor is compelled to rely upon his mortgage first, and is entitled to a dividend only upon the balance of his claim, if any, after his security is exhausted. There are some conflicting decisions upon this question in the courts of this country and in England.

The law governing the administration of estates in bankruptcy, which is, that creditors so secured shall have dividends only on the residue of their claims after converting and applying the security, or after deducting its appraised value, has been applied sometimes in the settlement of an insolvent estate, after the death of the debtor, or under his assignment; but there seems to be no warrant for any such application of the bankruptcy doctrine. The rule in bankruptcy proceeds, it is generally said, upon the express provisions of the statute requiring the creditor to give up his security in order to be entitled to prove his whole debt, or if he retain it, only proving for the balance of the debt after deducting the value of the security held, and hence is not controlling upon a court administering in equity upon the estate of insolvent debtors. By the great preponderance of authority, the creditor has a right, in the absence of statute, to prove and have dividends upon his entire debt, irrespective of the collateral security. (Jones on Pledges, § 587; 1 Story Eq. § 564*b*; *People v. Remington*, 121 N. Y. 328; *Allen v. Danielson*, 15 R. I. 481 (overrul-

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ing *Knowles, Petitioner*, 13 R. I. 90; *In re Bates*, 118 Ill. 524; 59 Am. Rep. 383; *Paddock v. Bates*, 19 Ill. App. 470; *West v. Bank of Rutland*, 19 Vt. 403; *Walker v. Bazler*, 28 Vt. 710; *Citizen's Bank v. Patterson*, 78 Ky. 291; *Brown v. Merchants' Bank*, 79 N. C. 244; *Moses v. Ranlet*, 2 N. H. 488; *Morris v. Olwine*, 22 Pa. St. 441; *Keim's Appeal*, 27 Pa. St. 42; *Graeff's Appeal*, 79 Pa. St. 146; *Mason v. Bogg*, 2 My. & Cr. 443; *Kellogg's Case*, L. R. 3 Chan. App. 769.)

These cases proceed upon the theory, that by the contract between the debtor and creditor, the creditor secures a personal right against the debtor, and also a right to proceed against the security in case the debt is not paid. The debt or personal right is the principal thing; the security being regarded as something collateral, which does not reduce the debt, but only secures the creditor *pro tanto* in case the debt is not paid in full by the debtor or his estate. In the absence of the intervention of positive or statutory law, this contract is not varied or changed by the insolvency of the debtor or his assignment, and the courts will not interfere with the rights and remedies which a creditor secures to himself by contract. Hence he may prove against the estate for the entire amount due him, and receive his dividend accordingly. And this comports with the provisions of the assignment law of this state, which requires the court to "order the assignee to make from time to time fair and equal dividends, among the creditors, of the assets in his hands, in proportion to their claims," (Code, § 3180,)—not in proportion to their claims less the value of any security they may hold.

Counsel for appellant invoke the well-recognized equitable principle that if a creditor have two funds out of which he may make his debt, he will be required to resort to that fund upon which another creditor has no lien. While this is true as a general rule, it must be understood with some qualification, and "is never applied except when it can be done without injustice to the creditor,

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or other party in interest, having a title to the double fund." (Story's Eq. §§ 560, 633.) "In its application, the paramount incumbrancer must not be delayed or inconvenienced in the collection of his debt, for it would be unreasonable that he should suffer because some one else has taken imperfect security." (3 Pom. Eq. § 1414; *Evertson v. Booth*, 19 Johns. 485.) It is, therefore, thought this principle has no application to a case like the one at bar. (*People v. Remington*, *supra*; *Paddock v. Bates*, 19 Ill. App. 470.)

We are aware a different rule from the one here contended for is announced in *Amory v. Francis*, 16 Mass. 308; *Farnum v. Boutella*, 13 Met. 159, and *Wurst v. Hart*, 13 Iowa, 515; but, with the court of appeals of New York, we think that, "whether we look at this question in the light of reason, or of the adjudged cases, the rule which best commends itself to our judgment is that which leaves the contractual relations of the debtor and his creditor unchanged when insolvency has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement. The creditor is entitled to prove against the estate for what is due to him, and to receive a dividend upon that amount. If the collateral securities are more than sufficient to satisfy any deficiency in the payment of the debt from the dividends, the personal representatives may redeem them for the benefit of the estate." (*People v. Remington*, *supra*.)

The judgment appealed from is therefore affirmed.

Statement of the case.

[Filed June 18, 1892.]

J. Q. A. BOWLBY ET AL. v. CHARLES W. SHIVELY
ET AL.

TIDE LANDS—TITLE OF STATE—POWER OF SALE—RIGHTS OF NAVIGATION.—

When the state of Oregon was admitted into the union, the title to the tide lands within its boundaries vested in the state, which might, by virtue thereof, sell or otherwise dispose of all the lands between high and low tide, in fee simple, subject only to the paramount rights of navigation and commerce over the waters.

GRANT OF GENERAL GOVERNMENT—UPLAND OWNER—HIGH TIDE MARK.—

By a grant from the general government, an upland owner of real property abutting upon tide-water takes title only to high tide mark.

Clatsop county: FRANK J. TAYLOR, Judge.

Defendants appeal. Affirmed.

This is a suit to quiet title. The plaintiffs allege in substance that they are the owners and in possession of all the tide lands on the west half of block 141, on all of blocks 126 and 127 and north thereof, and on the west half of block 146 and north thereof, in the city of Astoria, as laid out by John M. Shively, by virtue of deeds from the state of Oregon, more than ten years prior to this suit; that the premises are within the corporate limits of the city of Astoria; that all the wharfing privileges and appurtenances thereto are owned by the plaintiffs; that they have erected and maintained a wharf in front of block 127; that the same extends out into the Columbia river; that the defendants,—husband and wife,—pretending to act under the provisions of the Astoria Sea Wall Charter Act, passed February, 1891, attempted, by a written instrument filed and recorded by them, to dedicate to the public, streets adjacent to the premises of the plaintiffs, except adjacent to blocks 126 and 127; that said instrument is void, and casts a cloud upon the title of plaintiffs, which they ask to have removed, and that the defendants be enjoined from setting up any title thereto.

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The defendant C. W. Shively answered admitting plaintiffs' possession, but denying their title to the tide land on any of the blocks except as to the west half of block 146. The allegations in the counter-claim are in substance that John M. Shively and his wife, in 1854, were the owners in fee of a donation land claim embracing a large portion of the present city of Astoria, and that by patent issued to them in 1865, the said donation claim was bounded on the north by the Columbia river; that on the twentieth day of May, 1854, the said Shively and wife laid out and caused to be recorded a plat of the original town of Astoria, and also an addition thereto, known as Shively's addition, in which was embraced all the property in controversy; that the land platted included not only the high land but also the tide lands, and a portion of the bed of the Columbia river, and that each of the blocks was bounded by a street sixty feet in width, with the exception of the north tier; that a portion of the said blocks in the north tier, including said block 127, was bounded by a way thirty feet in width, but that the remainder of the blocks in the north tier, including block 146, was bounded by a street sixty feet in width; that block 141 is partly above and partly below ordinary high tide; and that lying between block 141 and the main channel of the river are blocks 126 and 127; that north of block 127 is the thirty-foot way already mentioned, and that between said way and the ship's channel of the Columbia river there is a distance of some eight hundred feet, upon which no lots or blocks were laid out upon the plat; that lying south of block 141 is block 9, which is alleged to be entirely upon the high land, and is separated from block 141 by a street; that block 4 is partly above and partly below ordinary high tide, and that north of and between it and the main channel is block 146, and that between block 146 and the main channel is a street sixty feet in width. It is further alleged that in February, 1860, John M. Shively and wife executed a deed to one James Welch for blocks

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146, 126, and 127, as laid out and recorded on said plat, and that on the same day they conveyed to Nancy Welch block 9 by a similar description, and that by various conveyances the plaintiffs have succeeded to the said title of the said James and Nancy Welch to the said blocks, but that the plaintiffs have no other or further right or title to the property in controversy other than such as they may have derived from the deeds of the board of school land commissioners; that on the eighteenth day of September, 1876, the state of Oregon conveyed to the plaintiffs by deed all the tide land in block 146, but that no deed has ever been executed to any one by the state for any tide land north of said block 146; and that on the same day, the state conveyed by deed to plaintiffs, with the following description, "all the tide land lying between ordinary high tide and ordinary low tide, lying both on and in front of the east half of block 5 in the tract known as Shively's Astoria, and including the tide land on the east half of block 145 in said Shively's Astoria; also that parcel, being all the land lying between ordinary high tide and ordinary low tide, both on and in front of block 9 in said Shively's Astoria, including all the tide land in block 141 in said Shively's Astoria, containing 4.63 acres, more or less." It is also alleged that John M. Shively, having acquired his wife's interest, and never having conveyed away the bank lots abutting and fronting on blocks 141 and 146, nor any rights north of blocks 127 and 146, except as inferable from the above described conveyances, did, on December 15, 1890, convey to C. W. Shively all his rights in the property in controversy.

The defendants ask that they may be decreed to be the owners of all the riparian and wharfage rights on block 141, and in front thereof to the deep ship channel of the Columbia river, except so much thereof as is embraced in blocks 126 and 127, and that they may be decreed to be the owners of the riparian and wharfage rights north of and

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in front of block 4 in said town, to the said deep ship channel of the Columbia river, except in so far as those rights may be embraced in block 146. The plaintiffs demurred to the answer of the defendant C. W. Shively, setting up a counter-claim, which was sustained by the court below, etc.

Sidney Dell, and *W. W. Cotton*, for Appellants.

J. Q. A. Bowlby, and *Fulton Bros.*, for Respondents.

LORD, J.—The facts as stated above, for the purposes of the case, may be thus summarized: That John M. Shively, who was the owner of certain property on the Columbia river, platted and laid it out into blocks and lots, some of which extended below the line of ordinary high tide, and some below the line of low tide, and that he sold to James Welch the blocks already described, lying below the ordinary high tide, with reference to such plat, and that the plaintiffs have succeeded to Welch's title to the same, and that since then the plaintiffs have acquired by deed from the state of Oregon all the tide lands on and in front of said blocks. Under the title and rights thus acquired by purchase from the grantees of John M. Shively and from the state, the plaintiffs have built and extended a wharf into the Columbia river, which the defendants claim is an invasion of their property rights. This claim is based on the assumption that an upland proprietor of land adjacent to tidal waters has certain rights in such waters and the tide lands covered by them peculiar to that situation, which are not enjoyed in common with the people at large; and that among them is the right of access to the navigable water by means of wharves over such tide lands, usually called a right of wharfage, which may be made the subject of sale and reservation by such upland owner. Hence it is argued that when John M. Shively sold and conveyed the blocks in question with their appurtenances with reference to the plat made by him, no mention having been made of such wharfage rights, he did not part with them by force of

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such conveyances, but that they were impliedly reserved, and as a consequence the wharf of the plaintiffs is an encroachment on his property rights. This assumption necessarily excludes the idea that the state may sell and convey its tide lands to a person not holding under the upland proprietor, so as to deprive such upland owner of his right of access to the navigable water by means of wharves and piers. On the other hand, the plaintiffs contend that the state may sell and convey its tide lands, and that its grantees take them free from any right therein of the upland owner, and subject only to the paramount right of navigation inherent in the public.

This proceeds upon the theory that the state is vested with the *jus privatum* and the *jus publicum* supposed to have been vested in the crown and parliament in the navigable waters and the soil under them. The distinction between such rights has been thus stated by EARL, J.: "From the earliest times in England, the law has vested the title to, and the control over, the navigable waters therein in the crown and parliament. A distinction was taken between the mere ownership of the soil under water, and the control over it for public purposes. The ownership of the soil analogous to the ownership of dry land was regarded as *jus privatum*, and was vested in the crown; but the right to use and control both the land and water was deemed a *jus publicum*, and was vested in parliament. The crown could convey the soil under water so as to give private rights therein, but the dominion and control over the waters, in the interests of commerce and navigation, for the benefit of all the subjects of the kingdom, could be exercised only by parliament. In this country, the state has succeeded to all the rights of both crown and parliament in the navigable waters and the soil under them, and here the *jus privatum* and the *jus publicum* are both vested in the state." (*Langdon v. Mayor*, 93 N. Y. 155.) Hence it is argued for the plaintiffs that a patent of the United

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States to a grant of land bounded by tide water limits the land conveyed to high-water mark, and gives the grantee no private or exclusive right whatever below that; that such a grant is exclusively a conveyance of dry land precisely as if it were bounded on all sides by dry land; that the state is the owner of the soil under water, or the tide lands, and as such owner may sell and convey such tide lands, and that its grantees may use and improve them by the erection of wharves, docks, or buildings, subject only to the paramount right of navigation, and that, as a consequence, upon the facts, the defendants have no private or exclusive rights whatever below high-water mark, or any property rights, wharfage, or otherwise, in the premises. This conclusion, it is insisted, is in harmony with our own adjudication, is the only principle upon which they can be sustained, and that the profession and people have so understood and acted upon them when dealing with such lands; so that a decision now adverse to them would tend to greatly disturb titles. It must be admitted, if this is a proper exposition of the law or deduction from it, as adjudged by this court, no matter what might be our personal view, if the question were *res integra*, it ought still to be adhered to.

Upon the admission of the state into the union, the tide lands became the property of the state, and subject to its jurisdiction and disposal. In pursuance of this power, the state provided for the sale and disposal of its tide lands by the act of 1872, and the amendments of 1874 and 1876. (Laws, 1872, 129; *id.* 1874, 77; *id.* 1876, 70.) By virtue of these acts, the owner or owners of any land abutting or fronting upon or bounded by the shore of the Pacific ocean, or of any bay, harbor, or inlet of the same, and rivers and their bays in which the tide ebbs and flows, within this state, were given the right to purchase all the tide lands belonging to the state in front of the lands so owned, within a certain time and upon conditions pre-

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scribed; and providing further, that in case such owner or owners did not apply for the purchase of such tide lands; or having applied, failed to prosecute the same as provided by law, then that such tide lands shall be open to purchase by any other person who is a resident and citizen of the state of Oregon; but, in consideration of the fact that prior to 1872, as it would seem, these lands had been dealt with as private property, and sometimes improved by expensive structures, the acts further provided in such cases, that where the bank owners had actually sold the tide lands, then the purchaser of the tide land from the bank owner, or a previous bank owner, should have the right to purchase from the state.

These statutes are based on the idea that the state is the owner of the tide lands, and has the right to dispose of them; that there are no rights of upland ownership to interfere with this power to dispose of them and convey private interests therein, except such as the state saw fit to give the adjacent owners, and to acknowledge in them and their grantees when they had dealt with such tide lands as private property, subject, of course, to the paramount right of navigation secured to the public. These statutes have been largely acted upon, and many titles acquired under them to tide lands. In the various questions relating to tide lands which have come before the judiciary, the validity of these statutes has been recognized and taken for granted, though not directly passed upon. This will become manifest in the examination of the decisions of this court upon the state's ownership of the tide lands, and the effect of its conveyances of the same.

In *Hinman v. Warren*, 6 Or. 411, the land in dispute was tide land on the Columbia river, and was embraced within the description of land patented to John McClure and wife by the United States. The plaintiff claimed title to it by a chain of conveyances from the McClures, and the defendant by deed from the state. "Upon these facts,"

McARTHUR, J., said, "two questions arise: 1. Do the tide lands belong to the state? 2. Did the patent of the United States invest in the McClures any estate in the land lying between the north line of their claim, as described in the patent, and the line which marks the ordinary high tide? In answer to the first question, our response is, that the tide lands—those that are covered and uncovered by the ebb and flow of the sea—belong to the state of Oregon by virtue of its sovereignty. This doctrine is the clear result of the principle announced in all the cases from *Pollard's Lessees v. Hagan*, 3 How. *212, to *Barney v. Keokuk*, 4 Otto, 324. * * * As the state became the owner of the tide lands, it had the power, under the provisions of the act providing for the sale of such lands, (Miss. Laws, 644,) to sell the same. It has, however, no authority to dispose of its tide lands in such a manner as may interfere with the free and untrammelled navigation of its rivers, bays, inlets, and the like. The grantees of the state took the land subject to every easement growing out of the right of navigation inherent in the public. The second question finds its solution in the application of the familiar principle that 'a grant of land adjacent to a navigable river, below the farthest point inland to which the neap tide flows, extends only to the meander line of high tide.' It is of no consequence that the calls of the McClure patent place the north line between high- and low-water mark."

Upon the first question, the court holds that the tide lands—the land in controversy being such—belong to the state by virtue of its sovereignty. Some contention is made that the phrase which describes the ownership of the state as being "by virtue of its sovereignty," indicates that the title held by the state to such lands is as trustee for the public, and not as absolute owner, capable of conveying private rights therein, subject only to the paramount right of navigation; but the use of this phrase in that case was not designed to convey that meaning, when considered with

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reference to the whole decision. The contention was, that the title of the tide lands, before the admission of the state into the Union, was in the United States, and subject to its disposal; and as it had granted away by its patent the tide lands in question before the state was admitted, no rights of the state ever attached to them. The court refused to accede to this view, but adopting the reasoning of *Pollard's Lessees v. Hagan*, *supra*, held that the state, upon its admission into the Union, became the owner of the tide lands, not as a grantee of the United States, but by virtue of its sovereignty, that the state had the right to dispose of such tide lands under the provisions of the statutes referred to providing for their sale, and that its grantees took them subject only to the paramount right of navigation existing in favor of the public. The decision, therefore, is based on the idea that the state has a *jus privatum* in the tide lands distinguishable from the *jus publicum*, which it may sell so as to convey private interests therein; hence the phrase, by virtue of its sovereignty, was not intended to preclude any private use by the state's grantee which did not interfere with the public rights. All this becomes more plain when the decision is considered with reference to the answer given by the court to the second question; namely, "that a grant of land adjacent to a navigable river below the farthest point inland to which the neap tide flows, extends only to the meander lines of high tides." This conclusion rendered the fact that the line of the McClure patent included the tide lands in controversy of no consequence or effect; his grant being bounded by the Columbia river, or tide water, limits the land conveyed to the line of ordinary high tide, and consequently gave him no estate, or exclusive rights below that.

That this is the proper deduction to be drawn from the decision upon this point, is made still more manifest by the language of BOISE, J., in *Parker v. Taylor*, 7 Or. 446, wherein he says: "As before stated, the patent from the United

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States conferred on the patentee no right to the tide lands lying between high and low water. These were the property of the state and absolutely at its disposal. Its deed gives to them—the grantees of the state—the same fee simple title to the tide lands as the patent from the United States gave to the land above high tide.” This language is based on the idea that the state has a *jus privatum* in the tide lands; and its grantees take them free from any right or easement therein by the upland owner, and subject only to the paramount right of navigation inherent in the public. It excludes the idea that the title of the state, or its grantee, to the tide land is subject to an easement or right of wharfage over the land as a natural right in the upland proprietor. It is impossible, as counsel say, that the tide land should be subject to this servitude, if the grantee of the state takes “the same fee simple title to the tide land as the patent gave to the land above high tide.” Moreover, in the same opinion, after stating that “the tide lands lying between high- and low-water mark belong to the state, and can be sold by it,” and that “the state has the power to provide for and regulate wharves, as it had done by act of the legislature,” BOISE, J., says: “Land situated as this is, covered with shoal water, may, under proper regulations by the state and municipal authorities, be reclaimed from the sea by filling in or by driving piles and building on them, and becomes private property and the subject of sale the same as any other property.”

This view, that the state is the absolute owner of the tide lands, free from any easement of the upland owner therein, and subject only to the paramount right of navigation, is still further illustrated in the case of *Parkers v. Rogers*, 8 Or. 183. In that case, the court was considering the question of wharf rights in connection with the right of a person who has purchased tide lands of a riparian proprietor to a deed from the state to such tide land, if he makes his application to purchase the same in the time allowed

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by statute, which necessarily involved the consideration of the act of 1872, and the act of 1874 amendatory thereof, *supra*, and their purpose and effect; and BOISE, J., said: "Though the state was under no legal obligation to recognize the rights of either the riparian owner or those who had occupied these tide lands, still the legislature, considering the facts that these lands had been dealt with as private property, and improved sometimes by the erection of expensive structures, which were of a great advantage to commerce, made what we think wise and just provisions for the protection of those who had spent their money in purchasing and improving these lands." While every one must, as the court says, regard these acts of the legislature as wise and just under the circumstances, yet, to avoid misapprehension, the court is just as particular to say that the state was under "no legal obligation to recognize such rights"; and as a consequence, if the state had not done so, neither the upland owners nor the purchasers from them would have had any rights whatever in the tide lands. In effect, it seems to us, in view of previous adjudications, as equivalent to saying that an upland owner on tidal waters has no rights as against the state or its grantees to extend wharves in front of his land, or to any private or exclusive rights whatever in the tide lands, except as he has derived them from the statute. It is true, the legislature of this state had made provision by which the upland owner within the corporate limits of any incorporated town might build wharves prior to the acts of 1872 and 1874, *supra*; but within the purview of our adjudications, it would, as a matter of power, have been equally competent to have given this privilege to others. (Hill's Code, § 4227.) But this act is not a grant: it simply authorizes upland owners on navigable rivers within the corporate limits of any incorporated town to construct wharves in front of their land; it does not vest any right until exercised; it is a license, revocable at the pleasure of the legislature, until acted upon or availed

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of. (*Eisenbach v. Hatfield*, 2 Wash. St. 236.) Shively did not avail himself of the license, nor is there any pretense to that effect. The plaintiffs have built a wharf upon and in front of their tide land. If the act is as applicable to tide lands as upland on navigable waters, they have exercised the right. The language of the act is, "the owner of any land lying upon any navigable stream or other like water," which would seem to apply to the owner of tide land; but, however this may be, the act has already received a construction from this court.

In *Parker v. Rodgers*, *supra*, after quoting this language of the act, BOISE, J., said, in speaking for the court: "We are aware that it is a general rule that what is appurtenant to land passes with it, being an incorporeal hereditament; but the right to build a wharf on the land of the state below high water is a franchise which attaches to the tide land, and is appurtenant to it rather than to the adjacent land, for it can be severed from the adjacent land, and enjoyed without it." This is predicated upon the idea that without the act an upland owner would have no right to build a wharf over the land of the state or tide lands, because the right or franchise attaches to the tide land, and is appurtenant to it, and not to the adjacent land. The grantor of the defendants did not avail himself of the license under the act; but the plaintiffs, as owners of the tide lands, have built a wharf; and in view of our adjudications, it is difficult to understand from what other source the right claimed by the defendants is to be derived. In the cases decided by this court, which have succeeded those mentioned, no other or different opinion in respect to the ownership of the tide land has been expressed by the court, or by any judge authorized to speak for it.

In *Wilson v. Welch*, 12 Or. 353, THAYER, J., undertook to express his own and a different view, not necessary to the decision of the case, and the other members of the court expressly refused to concur except in the result. In *McCann*

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v. *O. R. & N. Co.* 13 Or. 462, the same judge, recognizing that his opinions upon that subject would not meet with the concurrence of his associates, especially in consideration of the fact that his particular view was not necessary to the decision of the case, said: "I have for some time maintained a different view from that of my associates upon the bench, and also from that expressed in the opinion of some of our predecessors in adjudged cases, regarding the nature of the state's title to lands between high and low water mark. * * * My opinion upon the subject was expressed in *Wilson v. Welch*, 12 Or. 353. * * * I still adhere to that opinion. * * * But waiving that view of the question, and conceding that the state is, as some of the authorities have said, the owner in fee of the lands referred to, and can grant them, with the incidental rights of the shore or bank owner, to any private person the state government may please to favor, and still I do not see how the appellant can be entitled to the relief claimed under the provisions of said chapter 63 of the laws of the state." As this quotation explains the situation, it is hardly necessary to make any comment, other than to say that the "different view" his associates maintained, so far as I was concerned, was that "the opinion of our predecessors in the adjudged cases" should be regarded as settled law, which could not be disregarded without disturbing titles and bringing disaster perhaps upon those who had accepted and acted upon those decisions as the law of the state.

In *Parker v. Packing Co.* 17 Or. 510, the only question in the case was whether ejectment would lie to recover a wharfage right, and the court was agreed that it would not. In the preparation of his opinion, however, THAYER, J., expressed, as usual, his "different view," but without the concurrence of his associates, which, by some oversight, is not noted in the case. As these expressions of his personal views are so purely *obiter*, especially in view of the preceding cases, the nonconcurrence of his associates in them was

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hardly necessary to avoid misapprehension. It has been deemed necessary to review "the opinions of some of our predecessors in adjudged cases regarding the nature of the state's title to lands between high- and low-water mark," for the purpose of showing that these decisions are the foundation of the doctrine in this state,—that the state may sell and convey its tide lands, and that its grantees take them free from any right therein by the upland owner, and subject only to the paramount right of navigation inherent in the public; that this doctrine of the nature of the state's title to tide lands was so understood to have been adjudged in those cases by THAYER, J., and his associates, and was the producing cause of his "different view"; that Judge THAYER himself never understood or claimed that he was speaking for the court in the expression of such views, and that the nonconcurrence of his associates in them, in the first instance, was noted to avoid misapprehension, and for the reason that "the adjudged cases" had become the foundation of many titles and the law of the state, and ought not to be disturbed;—considerations which my present associates think ought still to govern us and to be adhered to, leaving out of view the stronger reason that "the opinions of our predecessors in the adjudged cases" are the better and more correct exposition of the law of the nature of the state's title to the tide lands. Nor is this doctrine peculiar to this state. In our neighbor state, Washington, the right of the state to dispose of its tide land free from any easement of the upland owner, is maintained in a well-considered opinion in *Eisenbach v. Hatfield*, 2 Wash. 353. That state, like our own, is largely affected by this question, and it is desirable that the rule of decision in the two states should be uniform. It certainly would be unfortunate if different rules should be established for either side of the Columbia river.

The cases regarded as leading in favor of this doctrine, are *Stevens v. Paterson etc. R. R. Co.* 34 N. J. L. 532, and

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Gould v. Hudson R. R. Co. 6 N. Y. 522. In the former of these, BEASLEY, C. J., said: "That lands under water, including the shore of tide water in New Jersey, belong absolutely to the state, which has the power to grant them to any one free from any right to the riparian owner in them." This language, and the uses to which the tide land was put not being in aid of navigation, flouts the idea that the right of disposal as against the upland owner was intended to be limited in its application to public uses. In the latter of these cases, *Gould v. Hudson R. R. Co. supra*, it was held by the court of appeals that an owner of upland along high-water line on the Hudson river has no exclusive riparian rights below that line, and hence sustained no legal damage from a railroad embankment built under a grant from the state which cut off his access to the river. This decision is a rule of property in that state, and has never been questioned. Other cases in which the same doctrine has been held, are *Pa. R. R. Co. v. N. Y. R. R. Co.* 23 N. J. Eq. 157; *Mattheissen etc. Sugar Refinery Co. v. Jersey City*, 26 N. J. Eq. 275; *In re Water Commissioners*, 3 Eds. Ch. *290; *Getty v. Hudson R. R. Co.* 21 Barb. 617; *Tomlin v. Railroad Co.* 32 Iowa, 106; 7 Am. Rep. 106; *Canal Com. v. People*, 5 Wend. 423; *People v. Canal Appraisers*, 33 N. Y. 461; *Monongahela Nav. Co. v. Coons*, 6 W. & S. 101; *McKeen v. Del. Canal Co.* 49 Pa. St. 424.)

Nor does the supreme court of the United States assert any doctrine to the contrary. It recognizes the fact that the rights of the upland owner are matters of legislation and usage in the several states, and applies the law of the state accordingly. This is illustrated in the case of *Hoboken v. Pa. R. R. Co.* 124 U. S. 656, in which Mr. Justice MATTHEWS states and applies the law of New Jersey, as adjudged in *Stevens v. Paterson, supra*. In the absence of legislation or usage in the several states, they declare that the common law rule would govern the rights of the riparian proprietor, and that by that law the title to the tide lands is in the state. In *Weber v. State Harbor*;

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sioners, 18 Wall. 65, Mr. Justice FIELD, after stating that it was not necessary to controvert the doctrine of *Yates v. Milwaukee*, 10 Wall. 497, for reasons quite apparent, proceeds to say: "Nor is it necessary to controvert the proposition that in several of the states, by general legislation and immemorial usage, the proprietor whose land is bounded by the shore of the sea, or of an arm of the sea, possesses a similar right to erect a wharf or pier in front of his land, extending into the waters to the point where they are navigable. In the absence of such legislation or usage, however, the common law would govern the rights of the proprietor, at least in those states where the common law obtains. By that law the title to the shore of the sea, and of the arms of the sea, and in the soils under tide water, is, in England, in the king, and in this country, in the state. * * * Upon the admission of California into the union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations, or among the several states, the regulation of which was vested in the general government."

In *Hardin v. Jordan*, 140 U. S. 371, Mr. Justice BRADLEY said: "With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted, inures to the state within which they are situated, if a state has been organized and established there. Such title to shores and land under water is regarded as incidental to the sovereignty of the state,—a portion of the royalties belonging thereto and held in trust for the public

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purposes of navigation and fishery,—and cannot be retained or granted out to individuals by the United States. *Pollard's Lessees v. Hagan*, 3 How. 212; *Goodtitle v. Kibbe*, 9 How. 471; *Weber v. Commissioners*, 18 Wall. 57.) Such title being in the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by congress with regard to public navigation and commerce. The state may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them and granting fisheries in particular localities; also, by reclamation of submerged flats and erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. (*Manchester v. Mass.* 139 U. S. 240; *Smith v. Maryland*, 18 How. 71; *McOready v. Virginia*, 94 U. S. 391; *Martin v. Waddell*, 16 Pet. *367; *Den v. Jersey Co.* 15 How. *426.) This right of the states to regulate and control the shores of tide waters and the land under them, is the same as that which is exercised by the crown in England. In this country, the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and in Pennsylvania to all permanent rivers in the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised. In the case of *Barney v. Keokuk*, 94 U. S. 324, we held that it is for the several states themselves to determine this question; and if they choose to resign to the riparian proprietors rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."

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From all this it appears that when the state of Oregon was admitted into the union, the tide lands became its property and subject to its jurisdiction and disposal; that in the absence of legislation or usage, the common law rule would govern the rights of the upland proprietor, and by that law the title to them is in the state; that the state has the right to dispose of them in such manner as she might deem proper, as is frequently done in various ways, and whereby sometimes large areas are reclaimed and occupied by cities, and are put to public and private uses, state control and ownership therein being supreme, subject only to the paramount right of navigation and commerce. The whole question is for the state to determine for itself; it can say to what extent it will preserve its rights of ownership in them, or confer them on others. Our state has done that by the legislation already referred to, and our courts have declared its absolute property in and dominion over the tide lands, and its right to dispose of its title in such manner as it might deem best, unaffected by any "legal obligation to recognize the rights of either the riparian owners, or those who had occupied such tide lands," other than it chose to resign to them, subject only to the paramount right of navigation and the uses of commerce. From these considerations it results, if we are to be bound by the previous adjudications of this court, which have become a rule of property, and upon the faith of which important rights and titles have become vested, and large expenditures have been made and incurred, that the defendants have no rights or interests in the lands in question. Upon this point there is no diversity of judgment among us. We all think that the law as adjudicated ought not to be disturbed, independent of other reasons and authorities suggested in its support. Speaking only for myself, I own that if the question in respect to riparian ownership was *res integra*, I am inclined to the opinion that the owner of the upland on tide water has certain rights, arising from

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his adjacency to such waters, subordinate, however, to their use by the public for navigation and fishing, which are not enjoyed in common with the public. But for the reasons suggested, I have felt bound to adhere to the law as adjudged by our predecessors.

It is, therefore, the unanimous opinion of this court, that there was no error, and that the judgment must be affirmed.

[Filed June 18, 1892.]

T. E. HOGG v. M. M. DAVIS.

TIDE LANDS—TITLE OF STATE—STARE DECISIS.—On the authority of *Bowby v. Shively*, ante, 410, it is held, that the title to the tide lands in the state vested in the state when it was admitted into the union.

Benton county: M. L. PIPES, Judge.

Defendant appeals. Affirmed.

J. K. Weatherford, for Appellant.

J. R. Bryson, and Dolph, Bellinger, Mallory & Simon, for Respondent.

LORD, J.—This is a suit to restrain the defendant Davis from erecting a building on certain tide lands belonging to the plaintiff in Benton county. The complaint alleges, that the legislature of Oregon, by an act approved October 24, 1875, granted to the Willamette Valley & Coast Railroad Company, and its assigns, all the tide and marsh lands in Benton county, upon the filing of its acceptance of said grant within thirty days, which acceptance was duly filed; that the land in question consists of all that parcel of land situate in front of lots 1 and 2 in section 28, and lot 8 in section 27, township 11 south, range 11 west, of Willamette meridian, said land being between the line of ordinary high and ordinary low water on Yaquina bay, and being a part of the tide and marsh lands selected in said county, and is a tide flat about one hundred and forty

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feet in width. The complaint alleges various amendments of the act referred to, not material to be considered on this argument. It shows title in plaintiff by mesne conveyances from the state's grantee of all the rights and title which the state could grant. It is alleged that said lots 1, 2, and 8 were filed upon and claimed June 16, 1869, by one Daniel Brown, under the homestead laws of the United States; that a final homestead certificate was issued to Brown on April 1, 1875, and that a patent was issued on such certificate to Brown on the first day of the following June; that whatever right Brown acquired under these proceedings and patents, passed by mesne conveyances to the defendant; that the defendant, claiming to have some easement therein by virtue of the said homestead title to said lots, has gone upon said tide lands and driven piles, and has begun the erection of a large and permanent structure therein, and threatens to complete the same, and will do so unless restrained by the court; that such structure will be a permanent obstruction to the use of plaintiff's premises and will greatly depreciate their value; that such structure is not in aid of commerce or designed or intended therefor, but is for his own individual use and benefit, and is an irreparable injury to the plaintiff.

The defendant demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of suit. The demurrer was overruled, and a decree entered accordingly, whereupon the defendant brought this appeal. The contention in the case arises over the conflicting claims of the defendant as adjacent owner to an easement in such tide lands in question, and of the plaintiff as owner of the tide lands through title derived from the state. The defendant claims that the state had no title in the tide lands in question, or that whatever rights it had, were and are subject to an easement therein by the upland owner.

Points decided.

There is no other question presented in this case; and our opinion in *Boulby v. Shively*, ante, 410, is decisive of the question involved.

It results that the judgment must be affirmed.

[Filed June 18, 1892.]

JANE SKOTTOWE v. THE OREGON SHORT LINE,
ETC., RY. CO., AND J. T. MULLEN, ADMR. v. THE
OREGON SHORT LINE, ETC. RY. CO.

NEGLIGENCE—INJURY—CONTROL OF LOCUS IN QUO—SUBSEQUENT REPAIR—

While evidence of additional precautions or subsequent repair is not competent for the purpose of proving antecedent negligence, it is competent for the purpose of showing that the place where the injury occurred was under the control of the defendant, and he may require the court to restrict such evidence to its legitimate effect by a proper instruction.

COMMON CARRIERS—DEPOTS—APPROACHES.—A corporation performing the

duties of a public carrier, is bound to keep its depots, or landing places, and the grounds around them, owned by such corporation, or in its possession, and used in connection therewith, safe and convenient for all persons who have lawful occasion to use them; and it is bound to keep all approaches thereto constructed by it and under its control for the use of persons having lawful occasion to use them, safe and convenient for such use, even though the same be within the limits of the highway or a street.

IDEM—ORDINARY CARE—DANGEROUS PLACE—CONTRIBUTORY NEGLIGENCE.—

A public carrier is only bound to use ordinary care in view of the dangers to be apprehended; it is not bound to keep its premises absolutely safe, nor is it liable for accidents due to a want of ordinary care on the part of the injured person.

DEATH OF PARTY—MEASURE OF DAMAGES—EARNING CAPACITY.—Under the

statute, the age and sex, the general health and intelligence of the deceased, his habits and capacity, mental and physical, to earn and acquire property, are all to be considered in estimating the damages; and this would include skill in the management of wealth, or capacity to manage affairs which would be of an advantage to an estate, and the loss of which would prove a detriment to it.

Wasco county: W. L. BRADSHAW, Judge.

Defendant appeals. Affirmed.

Argument of counsel.

W. W. Cotton, Zera Snow, and Wallace McCamant, for Appellant.

It was error to receive evidence of repair on the bridge after the accident, by rebuilding the panel which was out at the time of the accident. Plaintiff claimed the admission of this evidence on the trial only for the purpose of proving a control in the defendant company of the bridge in question; and it was for this purpose the court permitted the evidence to be received; but the jury were not instructed by the court that the evidence was not to be received for the purpose of proving negligence. Not only was the grade of the employé, who directed the repairs to be made, such as to call for the rejection of the evidence, but, aside from that, its admission was contrary to the well established doctrine that an admission made by an employé or agent after the transaction is inadmissible as evidence against the principal. (*Hudson v. C. & N. W. Ry.* 59 Iowa, 581; 44 Am. Rep. 692; *Packet v. Clough*, 20 Wall. 528; *Missouri Pacific v. Ivy*, 71 Tex. 409; 10 Am. St. Rep. 758; *Howard v. Savannah etc. R. R. Co.* Ga. March 21, 1890, 11 S. E. Rep. 452; *Durkee v. C. P. R. R. Co.* 69 Cal. 533; 58 Am. Rep. 562; *Luby v. Hudson R. R. Co.* 17 N. Y. 131; *Furst v. Second Ave. Co.* 72 N. Y. 542; *East Tenn. etc. R. Co. v. Maloy*, 77 Ga. 237; *Michigan Central Ry. Co. v. Gougar*, 55 Ill. 503; *Worden v. Humiston etc. Ry. Co.* 72 Iowa, 201; *Hayward etc. Co. v. Dunklee*, 30 Vt. 29; *Randall v. Northwestern Telegraph Co.* 54 Wis. 140; 41 Am. Rep. 17; *Goetz v. Kansas City Bank*, 119 U. S. 551; *Fogg v. Child*, 13 Barb. 246; *Lowry v. Harris*, 12 Minn. 255; *Converse v. Blumrich*, 14 Mich. 109; 90 Am. Dec. 230; *Whiteside v. Margarel*, 51 Ill. 507; *Morse v. Minneapolis etc. Co.* 30 Minn. 465; *Terre Haute etc. Co. v. Clem*, 123 Ind. 15; 18 Am. St. Rep. 303; *Nalley v. Hartford Carpet Co.* 51 Conn. 524; 50 Am. Rep. 47; *Hudson v. Chicago etc. Ry. Co.* 59 Iowa, 581; 44 Am. Rep. 692; *Cramer v. City of Burlington*, 45 Iowa, 627; *Baird v. Daly*, 68 N. Y. 547; *Salters v. D. & H. Canal Co.* 3 Hun, 338; *Payme v. Troy & Boston R. Co.* 9 Hun, 526; *Dougan v. Champlain Transportation Co.* 56 N. Y. 1.)

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A common carrier is not an insurer of the safety of persons on their way to its stations for the purpose of taking passage on its trains or boats. (*Pennsylvania Co. v. Marion*, 104 Ind. 239; *Moreland v. Boston etc. Ry. Co.* 141 Mass. 31; *Indiana Cent. Ry. Co. v. Huddleson*, 13 Ind. 325; 74 Am. Dec. 254; *Kelly v. Manhattan R. R. Co.* 112 N. Y. 443; *Robbins v. Jones*, 15 C. D. (N. S.) 211; *Quimby v. Boston etc. R. R. Co.* 69 Me. 340.)

The defendant was not bound to provide a road or way from the business part of the city to its landing place. Indeed, the defendant lacked the power so to do. It had no right to occupy the streets of Dalles City for this purpose. (*Fanning v. Osborn*, 41 Hun, 120; *Reed v. Richmond etc. R. R. Co.* 33 Am. & Eng. R. R. Cas. 503.) Nor could it condemn private property for the purpose of doing so. (*Witham v. Osburn*, 4 Or. 318.)

Plaintiff and deceased, coming as they were to defendant's landing at an unreasonable hour, were mere licensees. A licensee must take premises as he finds them, and the owner is under no obligation, as to him, to keep his ways in repair. (*Cusick v. Adams*, 115 N. Y. 55; 12 Am. St. Rep. 772.)

Where an instruction is asked upon a supposed state of facts, the instruction should be given if the evidence is sufficient to support the finding of those facts by the jury. (*Gird v. Murk*, 51 Ala. 566; *Flourney v. Andrews*, 5 Mo. 513; *Chicago etc. R. R. Co. v. Bingenheimer*, 116 Ill. 226; *Peoria etc. Ins. Co. v. Anapow*, 45 Ill. 86.)

It is well settled by the weight of authority that a sale of lots or blocks with reference to a given map or plat describing lots or blocks as bounded by streets, will amount to an immediate and irrevocable dedication of streets. (*Carter v. Portland*, 4 Or. 339; *Parrish v. Stephens*, 1 Or. 60; *Portland v. Whittle*, 3 Or. 128; *Cincinnati v. White*, 6 Pet. 431; *Wyman v. Mayor*, 11 Wend. 486.)

What facts constitute contributory negligence, is a question of law for the court, which cannot be referred to the

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jury. (*N. Y. L. E. R. Co. v. Enches*, 127 Pa. St. 316; 14 Am. St. Rep. 848; *Carlisle v. Sheldon*, 38 Vt. 440.)

In actions founded on a statute such as that in force in Oregon, on which the case at bar was based, the damages recoverable are wholly pecuniary. It must appear that the death of the decedent has been the cause of pecuniary loss to the estate. (*Holmes v. O. & C. Ry. Co.* 5 Fed. Rep. 523; *Holland v. Brown*, 35 Id. 42; *Serensen v. N. P. R. R. Co.* 45 Id. 411; *Pennsylvania Co. v. Butler*, 57 Pa. St. 337; *Mansfield Coal & Coke Co. v. McEnery*, 91 Pa. St. 189; 36 Am. Rep. 662; *Atchison etc. Ry. Co. v. Brown*, 26 Kan. 443.)

Nominal damages are all that are recoverable where the evidence fails to show a probable saving capacity. (*Howard v. Del. & Hudson Canal Co.* 40 Fed. Rep. 198.)

A. S. Bennett, for Respondent.

While evidence of additional precautions or subsequent repair is not competent for the purpose of proving antecedent negligence, it is competent for the purpose of showing that the place where the injury was received was under the control of defendants. (*Readman v. Conway*, 126 Mass. 374; *Elliott, Roads and Streets*, 650; *Lafayette v. Weaver*, 92 Ind. 479; *Manderschid v. Dubuque*, 29 Iowa, 87; 4 Am. Rep. 196; *Folsom v. Underhill*, 36 Vt. 580.)

Even verbal admissions of an agent subsequent to the transaction in question are admissible when made within the scope of his authority. (*Morse v. R. R. Co.* 72 Mass. 450; *Kirkstall v. Furness*, L. R. 9 Q. B. 468; *Clifford v. Burlon*, 1 Bing. 199.)

A common carrier is liable for negligence in its construction of or failure to repair its station approaches. (*Patterson, Railway Accident Law*, 253; *Quimby v. B. M. Ry. Co.* 69 Me. 341; *C. & N. W. Ry. Co. v. Fillmore*, 57 Ill. 265; *Hulbert v. N. Y. Cent. Ry. Co.* 40 N. Y. 145; *Hartwig v. R. R. Co.* 49 Wis. 358; *Carleton v. Franconia*, 99 Mass. 216.)

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There is nothing in the claim of defendant that it was exonerated from liability for the bad repair of the elevated walk to its wharf, if it had been shown that such elevated walk was upon a public street or private property. It makes no difference upon whose land such walk was situated. If it was constructed and controlled by the defendant, it is liable. (*Tobin v. Portland Ry. Co.* 59 Me. 188; *Quimby v. Ry. Co.* 69 Me. 340.)

LORD, J.—These actions are brought by Jane Skottowe, in the one case, and by J. T. Mullen, as administrator of the estate of Nicholas Skottowe, in the other case, against the defendant, to recover damages resulting from a fall by Jane Skottowe and her deceased husband from an elevated way leading from Dalles City to the defendant's boat landing, which fall caused serious injury to Jane Skottowe, and the death of her husband. The liability of the defendant is predicated on the ground that the defendant was negligent in failing to keep in repair the elevated way, or bridge, from which the plaintiff and the deceased fell, and were injured, and in failing to provide such place with proper lights. The answer of the defendant put in issue all the material allegations of the complaint, and further alleged that the elevated way, or bridge, causing the injury and death, was not the property or in the possession or under the control of the defendant, and as a separate defense. that the plaintiff and her deceased husband were guilty of contributory negligence.

The facts are substantially these: The plaintiff and her deceased husband were citizens of Ireland, traveling in this country with the double purpose of visiting a son, who resided in the state of Wyoming, and such places as would interest them or contribute to their pleasure. It would seem that they had secured a round-trip ticket from Portland to The Dalles and return, and that they had come up to The Dalles by railroad with the intention of returning

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to Portland by the river on one of the boats of the defendant, for the purpose of obtaining a more complete view of the Columbia river scenery. The boats of the defendant were fitted up with state-rooms and other adjuncts for the comfort and accommodation of its passengers. As the hour at which the defendant's boats were accustomed to leave in the morning was early,—seven o'clock,—the company, for its own advantage, and for the convenience of its passengers, allowed them to come on board of its boats at night and to sleep there. For this accommodation the defendant charged and received a specified consideration, and by reason of it, its passengers were saved from the necessity of arising at an inconvenient hour in the morning in order to reach the boat. The plaintiff and her husband reached The Dalles some time about the middle of the day, and during the afternoon went down to the wharf boat, as it would seem, for the purpose of acquainting themselves with the way to the boat's landing, and ascertaining what arrangements were necessary to be made to get on board of the boat. The agent of the defendant informed them at the office that they could come on board of the boat that night, as soon as it came in, and sleep there until morning, so that they would be on the boat at its hour of starting.

Concluding to avail themselves of this accommodation, they returned up town; and after getting a meal at a restaurant, and walking and looking around until the time had come for the boat to arrive, they started down to its landing. It was after dark when the defendant's boat came in, but owing to the fact that it had a barge in tow, it proceeded up the river, under slow bells, past its landing place, to a point on the river about opposite the place where the accident occurred, for the purpose of landing the barge, when it turned back to make its landing. Her lights were lit; and it was while some of these things were occurring that the accident happened. The landing place of the defendant's boat is some distance below the inhabited por-

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tion of The Dalles, and is reached by a long elevated incline and narrow roadway which passes over Mill creek by means of a bridge. One portion of this roadway, at the point where it leaves the inhabited portion of The Dalles, is occupied by the defendant's railroad tracks, and leads to its shops, while the other portion of it gradually inclines and leads to its wharf or boat landing. These two ways at the point where the injury occurred are connected and rest on the same timbers. The situation is difficult to describe, but it is shown on the photographic exhibits. These different ways were originally built by the O. S. N. Co., the defendant's predecessor in interest, for the purpose specified, and since then have been constantly used as a means of access to and from its shops and the landing place of its boats. At different times the company has rebuilt and repaired this roadway, raised and changed it, and exercised various acts of control over it. The place where the accident occurred, and over which the elevated roadway or bridge crosses Mill creek, is a short distance below the last building in the inhabited portion of the city. The land under the bridge was doubtless a public street at the point of the accident, as it seems to have been platted as such, but the city has never opened it as a street, nor exercised any control or ownership over the elevated roadway or bridge. "There was no evidence," the record says, "in the case tending to show that Dalles City, or any one, except the railroad company and its predecessors in interest, had exercised any control of the bridge at the place where the accident occurred, or had ever operated or repaired the same." The bridge is from twelve to twenty feet from the ground, which is of a rocky and uneven character, and along the bridge there has always been a rail running, which a short while before the accident got loose and came off and never was replaced until after the injury occurred.

The circumstances of the fall from the bridge are thus related by the plaintiff: "We had passed the town and

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got to the way leading to the boat, it being then nearly dark. We suddenly fell down a height. The fall rendered me unconscious. I was aroused by my husband's calls for help. I became unconscious again, and then got conscious again when the men came to carry me up from where I had fallen. Shortly before the accident, we remarked to each other on the want of light. We were feeling our way cautiously along immediately before the accident. My husband's calls for help at the place of the accident was the first thing I knew after the accident, while we were lying on the stones near the river." The injuries to the husband of the plaintiff were of such a character as to cause his death a day or two afterwards. The injury to the plaintiff confined her to bed for many months, and, the evidence indicates, will perhaps render her subject to much suffering and a cripple for the remainder of her life. From these facts and circumstances, it seems evident that the plaintiff and her deceased husband, while passing over the bridge, or elevated roadway, seeing out in the river the boat, which was lighted up, and supposing that they had reached the landing, walked through the opening occasioned by the want of railing, and were precipitated upon the rocks below.

Upon this state of facts, the most vital point of contention for the defendant is, that the duty of a passenger-carrier to provide reasonably safe approaches to a landing place, or station, is confined only to the immediate vicinity of its landing or station, and to approaches on its own ground or right of way, and that, as the facts show that the land over which the bridge was constructed, and where the accident occurred, was a public street, the defendant was under no obligation to keep such bridge in repair or properly lighted. There are other questions connected with this upon which error is alleged, and to which we shall advert at the proper time.

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There is, however, a preliminary question upon the evidence, to which an exception was taken, that must be first disposed of. One Mr. Allen was called as a witness for the plaintiff, and testified that he was in the employ of the defendant, and engaged in carpenter work; that about two days after the accident he repaired the bridge by replacing the missing railing. He was then asked the question: "Under whose direction?" To this question the defendant objected as incompetent and immaterial; whereupon plaintiff's counsel stated in open court and in the presence of the jury that he did not offer the testimony for the purpose of showing negligence, but for the purpose of showing acts of ownership and control over the bridge, and the court ruled that the evidence should be received for that purpose, and for that purpose only. The witness then answered that he was instructed by Mr. De Huff, the company's foreman, or superintendent, at the shops. It is conceded that this evidence is hardly sufficient to show that Mr. De Huff had authority from the railroad company to make the repair in question, but no proper means were taken to get rid of this aspect of it. As already disclosed, this evidence was offered for the purpose of showing that the bridge, or place where the injury was received, was under the control of the defendant. As applicable to this object, no objection is made, if the evidence shall be restricted exclusively to this purpose. It is not the fact that repairs were actually made by the defendant, or the inference of control or ownership sought to be drawn, to which objection is urged, but that such evidence is inadmissible for that purpose, unless the jury were instructed or expressly cautioned by the court, when it was received, that it could not be considered by them on the question of negligence. Counsel for the plaintiff stated that the evidence upon objection was only offered to prove the control of the defendant over the place of injury, and not to prove negligence, and the court ruled in the presence of the jury that it would only be admitted for

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the purpose of showing control. Notwithstanding this, however, it was argued that this statement and ruling were not enough to remove the objection for incompetency, unless the court went further when the evidence was received and instructed or cautioned the jury that they could not take it into consideration upon the question of negligence on the part of the defendant; otherwise the jury would be authorized to consider such evidence as proof of negligence, or to treat it as a link in the chain of such proof, contrary to the well established rule that evidence of subsequent repairs is not competent for the purpose of proving antecedent negligence. That this rule is now to be regarded as settled law in a proper case is not controverted, as the authorities in support of it fully indicate. (*Morse v. Minn. etc. Co.* 30 Minn. 465; *Terre Haute etc. R. R. Co. v. Clem*, 123 Ind. 15; 18 Am. St. Rep. 303; *Nally v. Hartford Carpet Co.* 51 Conn. 524; 50 Am. Rep. 47; *Hudson v. Chicago & N. R. R. Co.* 59 Iowa, 581; 44 Am. Rep. 692.) The principle seems equally as well established that, while evidence of additional precautions or subsequent repair is not competent for the purpose of proving antecedent negligence, it is competent for the purposes of showing that the place where the injury was received was under the control of the defendant, who may require the court, if he choose, to restrict it to that point by a proper instruction. As the court said, in *City of Lafayette v. Weaver et al.* 92 Ind. 479, such evidence "was not admissible to prove negligence on the part of the city, the question as to which was to be determined by what was known before and at the time of the accident, but it was evidence of the city's recognition of the defect in the sidewalk as one which the city was bound to repair, and was admissible for such purpose. * * * By proper request, the appellant could, through an instruction, cause the restriction of the evidence to its legitimate effect." (*Elliott on Roads and Streets*, 650.)

Independent of these considerations, we do not think there was any liability of the jury considering the evi-

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dence for any other purpose than showing control or authority over the *locus in quo*, as the circumstances under which it was admitted expressly restricted it to this purpose, and exclude the idea of its being admitted to prove negligence. So that, as the exception stands, while we agree that such evidence is and ought to be regarded under any circumstances as incompetent as an admission of negligence, we do not understand it is incompetent to show authority over the *locus in quo*, or control over the place where the injury occurred. If the evidence was competent for this purpose, there was no other defect, except possibly to show the authority of De Huff to order the repairs—his agency to connect the company with the making of the repairs; but this was regarded as of no consequence and merited little attention of counsel, for the reason, doubtless, that there was other evidence, before the accident, indicative of the defendant's control over the place of the injury, or recognition of its duty to keep the bridge in good condition and repair, such as the construction and repair of the bridge, and the exclusive use of it as a means of access to its boat landing. Moreover, as the question was asked, the answer might have been that the repair of the bridge was directed to be done by the representative of the defendant, so far as the court could know, but if the answer did not sufficiently connect the company,—turned out to be improper,—it was the duty of the defendant claiming to be injured by it to move to strike it out. Still, if we thought the evidence was incompetent, as the case stands, in view of its importance and liability to arise frequently in the trial court, we should hesitate to excuse the error, solely because no motion was made to strike it out.

The next alleged error is the refusal of the trial court to direct a verdict for the defendant. The contention is, that the undisputed evidence shows no liability upon the part of the defendant. This is based on the assumption that the undisputed evidence shows that the elevated walk or bridge

to the boat landing of the defendant is upon a public street, and as a consequence, neither the defendant nor its predecessors had any right to occupy the street by a bridge for this purpose, and that even if they did so originally, by constructing and subsequently by keeping it in repair, it was a voluntary act, and placed the defendant under no obligation to keep it in repair, or liability for want of repair. As the question involved is important and vital, as affecting the liability of the defendant, it deserves to receive, despite the pressure of our duties, our best consideration. At the risk, therefore, of some repetition of the facts already stated, but to make more clear, if possible, the relation of the defendant to the *locus in quo*, as a part of its means of approach to its boat landing, and the relation of the city to it, as showing its control over it, we quote from the bill of exceptions the following facts: "Plaintiff also called as witnesses, John Cates, R. A. Roscoe, and George H. Knaggs, whose evidence tended to show that the bridge in question, from which it is claimed that the fall occurred, was constructed by the Oregon Steam Navigation Company, a transportation company engaged in operating boats and portage roads from The Dalles on the Columbia river; that the Oregon Railway & Navigation Company succeeded to the Oregon Steam Navigation Company; and further tended to show that the Oregon Railway & Navigation Company continued to operate and control the bridge until their railroad and boat line was leased to the defendant as shown herein, and that the bridge in question was the bridge extending on from Main street in Dalles City across a ravine through which Mill creek runs, and leading to the lower beat landing used by the Oregon Railway & Navigation Company as a landing for the boats operated by them on the Columbia river; that it was such bridge leading to such landing at the time of the lease; and since then it had been used by the present company in operating boats on said river as a means of access to and from the town of The

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Dalles and the boat landing. The evidence further tended to show that the bridge had been raised once or twice by the Oregon Railway & Navigation Company and the defendant company, and that the defendant company had exercised acts of control over the bridge in keeping the same up and preventing it from being floated away by high water; and by means of the route over this bridge it was the only route to the lower boat landing; and no other person or persons had had anything to do with the control of said bridge or keeping it in repair from the time it was built up to the time of the injury to the plaintiff. The evidence of these witnesses also tended to show that there was no business other than that connected with the defendant company's business west of the bridge in question which would take persons thereover, and that the bridge was used only by persons having business with the defendant company, and that it was used by such persons in traveling to and from its wharf for the purpose of traveling over its line and in shipping and receiving freight. The testimony of these witnesses further tended to show that one side of the bridge in question was a railroad bridge, used exclusively by the defendant as a means of access to its shops and round-houses, the other portion of the same being a narrow plank roadway, used as a means of access to and from its boat line and wharves, with the two ways separated and deflected from each other some distance west of the place where plaintiff was injured."

In view of these facts, it is important to ascertain the duties of the defendant as a public carrier to keep all the approaches to their boat-landing, or depot, owned by them, or constructed by them, and under their control, or in their possession, and used in connection therewith, safe and convenient for the use of its patrons, or those who have lawful occasion to use them. DILLON, C J., laid down the rule, as founded upon reason and authority, that "railroads are bound to keep in a safe condition all portions of their

platforms, and approaches thereto, to which the public do or would naturally resort, all portions of their station-ground reasonably near to the platforms, where passengers or those who have purchased tickets with a view to passage on their cars would naturally ordinarily go." (*McDonald v. Chicago etc. R. R. Co.* 26 Iowa, 145; 96 Am. Dec. 114.)

Such corporations are not only bound to keep their platforms and landing places safe and convenient for all who make use of their cars or boats as a means of conveyance, but they are bound to make the approaches over their own premises, or premises in their possession and used in connection therewith, safe and convenient for passengers. The liability for the non-performance of this duty by such corporations is founded on the general principle that a person injured without neglect on his part by a defect or obstruction in a way or passage over which he has been induced to pass, for a lawful purpose, by an invitation, express or implied, can recover damages for the injury sustained against the individual so inviting and being in default for the defect. (*Barrett v. Black*, 56 Me. 498; 96 Am. Dec. 497; *Carleton v. Franconia Iron Co.* 99 Mass. 216.)

This principle finds its illustration in *Tobin v. S. & P. R. R. Co.* 59 Me. 183; 8 Am. Rep. 415. There, a hackman, while carrying a passenger to the depot for transportation, stepped without fault into a cavity in the platform and was injured; and it was held that the company was liable, and that the liability was the same notwithstanding the platform was within the limits of the highway. The court, after stating that it was the duty of such corporations to make the approaches to their depots safe and convenient, and likewise to so keep their platforms and landing-places, not only for those who are passengers, but for all who have rightful occasion to use them, says: "It is objected that the defendant built the platform within the limits of the public highway; but it is no answer to the plaintiff, when seeking compensation for the consequences of their neglect, that they have tres-

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passed upon the rights of the public. They have built the platform and used it. Their passengers and those having rightful occasion to be upon it, are there by their invitation, and they are responsible for its condition. It may be that the city of Portland might be liable for a nuisance within the limits of their public highways, erected and maintained by the defendant corporation; but, if so, the city has the right of reclamation against those creating the nuisance. Much more, then, could the party injured maintain his action directly against the corporation causing the injury." In *Quimby v. B. & M. R. R. Co.* 69 Me. 340, these principles are reasserted, but the fact that the sidewalk where the injury occurred was not in the possession and control of the defendant as one of the approaches to their station, defeated a recovery. The court says: "A railroad corporation is bound to keep its depot and the grounds around it owned by the corporation, or in its possession and used in connection with it, safe and convenient for persons who have lawful occasion to use them. It is bound to keep all approaches to its depot, constructed by it and under its control, for the use of persons having lawful occasion to use them, to go to or from its depot or cars, safe and convenient for such use, even though the same may be within the limits of the highway. The burden was on the plaintiff to show that the walk where he received his injury was constructed by the defendants, and was in their possession and control as one of the approaches to their station." The court then proceeds to state the facts, showing that the sidewalk was not in the possession of the defendant, but that the city had resumed control of it, and kept it in repair, and as a consequence, that the defendant corporation was not liable.

The court further says: "Upon this state of facts, we think it clear that the defendants were under no obligation to keep the sidewalk in repair. It was no part of their bridge. It was a part of the public street under control

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of the city. The defendants had no right to enter upon it to make any changes or repairs. Their liability ceased when they restored the condition of the sidewalk to the acceptance of the city." This case is cited by the defendant, but the principle it declares and recognizes is fatal to its contention. Mr. Hutchinson says: "It is the duty of the carrier to provide a reasonably safe means of getting to and from the station, and it will be liable for an injury resulting from its failure so to do. And if passengers, habitually, naturally, and with the acquiescence of the carrier, adopt a certain route, especially a route pointed out by the customs and methods of the carrier, it is the duty of the latter to take reasonable precautions to so guard and maintain it that passengers will not thereby suffer injury. It is immaterial in this respect, whether the carrier furnished the route or provided or constructed the means of passage or not. If, with full knowledge of the facts, it permits an unsafe and dangerous means to be provided and used, it is as much liable for an injury arising therefrom as though it had itself set up and maintained a dangerous way. The same rules apply to carriers by water, who are liable for furnishing dangerous gangplanks for use by passengers." (Hutchison, Carr. 2 ed. § 519; *Cross v. Railway Co.* 69 Mich. 363; 13 Am. St. Rep. 399; *Hoffman v. R. R. Co.* 75 N. Y. 605; *Green v. Pa. Ry. Co.* 36 Fed. Rep. 66; *Texas Ry. Co. v. Orr*, 46 Ark. 182; *Wallace v. R. R. Co.* Del. Dec. 13, 1889, 18 Atl. Rep. 818; *Collins v. R. R. Co.* 80 Mich. 390.)

Plainly, then, it is the duty of such corporations to provide reasonable accommodations at their stations and landing places; to keep in safe condition all portions of their platform and approaches thereto, and furnish safe and proper means of ingress and egress therefrom, even though some part of it may be constructed upon a highway, if the same be in their possession or under their control and used in connection with them. This duty and the liability of such corporations for its non-performance, when an injury

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occurs, in respect to such places, platforms, and approaches, as well as to furnish lights, is also fully stated, and the cases maintaining it, collected in 30 Am. & Eng. R. R. Cas. 555n.

But by this it is not meant that such companies are bound to keep their premises absolutely safe, or that they are liable for accidents due to want of ordinary care on the part of the injured person. They are only bound to exercise ordinary care in view of the dangers to be apprehended. The distinction between such liability for an injury to a passenger occurring on their cars or boats, and for an injury occurring on their platforms or approaches to the station or landing places, is well recognized. (*Pennsylvania Co. v. Marion*, 104 Ind. 239; *Moreland v. Boston etc. Ry. Co.* 141 Mass. 31; *Kelly v. Mun. Ry. Co.* 443.)

Nor is there any claim that the defendant is an insurer, but that it was bound to use ordinary care to keep its approaches to its boat landing safe and convenient; and that to leave a railing off of a bridge of this kind, at such a place, and at such a height from the ground, for a period of several weeks, was a want of ordinary care if not gross negligence. Nor do the cases cited by the defendant conflict with these principles, as declared by the authorities, or support its contention. It will be sufficient to notice those claimed to be most in point.

In *Eisenberg v. Mo. Pac. Ry. Co.* 33 Mo. App. 91, it did not appear that the road had been built by the defendant and held out to its patrons as a way to its depot. There was another and safer road, and the exact situation of the defect was known to the plaintiff. The only element in the case is that prior to the accident the company had improved it; but, upon plaintiff's own testimony, the case was void of all elements of negligence upon the part of the defendant. The court says: "In the case at bar, the danger was neither a hidden nor recent danger. The excavation existed before the road was built. The plaintiff knew the exact situation for years; his drivers knew it. This very driver had trav-

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eled over the road repeatedly on the day of the accident. He discussed such dangers, when they were in full view in broad daylight, with his fellow-servant; and knowing what risk he undertook, voluntarily assumed it, although he might have used another and safer road." It was a clear case of contributory negligence. In *Ousick v. Adams*, 115 N. Y. 55; 12 Am. St. Rep. 772, the bridge was built for the convenience of the defendant. The plaintiff was a stranger to him, and to whom he owed no duty; nor was the plaintiff upon the bridge upon the defendant's invitation, nor to do any business with him, but for the purpose of seeing a shooting match upon an island with which the defendant had no connection whatever. In *Texas etc. Ry. Co. v. Dessommes*, Tex. March 3, 1891, 15 S. W. Rep. 806, the testimony was so positive and definite that the defendant had nothing whatever to do with the crossing at the place of the injury, that the verdict was held contrary to the evidence. There is no relevancy in these cases, or the others cited, to the case at bar.

Nor is there anything in the fact, if it be admitted, that the land where this bridge was constructed and maintained by the defendant was platted as one of the public streets; it by no means follows that the city was bound to open the same to public travel. As THAYER, C. J., after showing that the dedication of streets by maps and plats was irrevocable and vested them in the public, said: "But it does not follow that the city is under any obligation to open and improve such streets at once; they may be allowed to remain dormant until their use becomes a public necessity." (*Meier v. Portland Cable Co.* 16 Or. 500.) There is no pretense or evidence to show that the city had opened this street beyond its inhabited portion. The evidence is undisputed that the defendant built the bridge partly upon it for its own purposes, and has ever since used it exclusively as a railroad bridge and as a way to its boats. The city had nothing to do with it. "There was no business other than that connected with the defendant company's business west

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of the bridge in question, which would take persons there-over, and it was used only by persons having business with the defendant company in traveling to and from its wharf for the purpose of traveling over its line and in shipping and receiving freight." So runs the record.

Nor do we think there is anything in the contention that the defendant is not liable, because the plaintiff and her husband started to go on the boat in the evening instead of in the morning. It was the custom of the defendant to receive passengers on its boats in the evening, and allow them to sleep there, for which they were charged extra, or "fifty cents for single berths and six bits for double." Its officers at the wharf boat informed the plaintiff and her husband of the custom, and they were going to the boat to avail themselves of it when the injury occurred. By so doing, the defendant invited its patrons to take passage on its boats in the evening instead of in the morning, and was bound to make its approaches safe for the travel of such persons as it was for persons who came on board in the morning. We think there was no error.

It is next objected that the court erred in declining to instruct the jury that the platting of the ground under the bridge in question as a public street and selling lots by reference to the same, constituted a dedication of the street. This objection is embraced in five long instructions out of the numerous instructions asked, and are justly subject to the criticism suggested by counsel. The proposition itself was not disputed as a matter of law, nor was the refusal of the court to give the instructions asked in conflict with it. It was the fact that the instructions ignored the distinction between the dedication of a street and the opening of that street as a public highway, by which the defendant sought to excuse liability, that caused the court to refuse them. But the view we have taken renders their further consideration unnecessary. The evidence shows that the street was not opened by the city, nor used by it, but that it was

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exclusively occupied by the defendant with its bridge as a means of access to its boat landing, and under its control at the time of the accident.

It is next objected that the trial court erred in refusing and modifying instruction number sixteen upon the question of contributory negligence. This instruction is objectionable, but instruction number thirty-nine, as given by the court, better states the law as applicable to the facts. There can be no doubt but the bridge was a place where a railing or guard on it was necessary at all times, but especially after dark, when passengers were expected to travel over it to and from the landing place. The plaintiff and her husband were strangers, and the circumstances already stated were not such as the court could declare contributory negligence.

The next objection is, that "the court erred in instructing the jury that the defendant was bound to keep its approaches safe and well lighted at all hours of night, regardless of the time set for the departure of its boats." This refers to the court declining to give certain instructions asked by the defendant, and giving certain others asked by the plaintiff. By the instructions thus given and refused, it is claimed that the court imposed upon the defendant the duty to keep the approaches, or bridge constructed by it, and under its control, leading to its steamboat landing, in such order and repair and so well lighted as to be reasonably safe at all hours of night. The complaint is, that this laid the duty on the defendant regardless of the time and of the fact that the boat did not leave until the next morning. Upon this point, the instruction given by the court was: "If the defendant had been in the habit of and accustomed to take passengers on the boat in the evening and permitting them to sleep thereon, then its liabilities as to a passenger passing over its walks and ways in the evening for such purpose, would be just the same, and its duties as to keeping its ways to its boat

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would be just the same as it would toward a passenger going to the boat at the hour of starting in the morning." The court did not, therefore, instruct the jury that the defendant was bound to keep its approaches safe and well lighted at all hours of night. The plaintiff and her husband were going down to the boat, as the evidence indicates, between six and eight o'clock in the evening. It was the usual time when the defendant was in the habit of receiving passengers; they were invited to come on board, and they had a right to be there; they were going there to do business with the defendant,—to sleep on board of the boat all night, and pay them for the accommodation. The benefit was mutual. It was not a gratuitous privilege for their own special convenience. The boat was just coming into its landing, and the time was in the evening and appropriate. There is no claim, nor can there be on the facts, that it was the duty of the defendant to keep its approaches to its landing safe at all hours of the night, but that it was its duty in the evening, when it was accustomed to receive passengers. Whether it was the duty of the defendant to keep them in that condition at other later hours in the night, was a matter with which the plaintiff in this case has no concern.

It is next objected that the damages awarded are excessive. The damages assessed by the jury are large. The evidence tends to indicate that the plaintiff is permanently injured. "I think," says the medical witness, "that if she does regain the use of her limb and it becomes free from pain, it will be several years. It will take a long time to fully recover, if she ever does." She is unable now to stand without support, and altogether unable to walk, and still suffers great physical pain from the injury. The probabilities are that she will be a cripple during her life, and subject to much pain and suffering. In such case, different individuals would vary in their estimate of the sum which would be a just pecuniary compensation. "It

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is one thing," said Mr. Justice STORY, "for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury, because it exceeds that measure." (*Thurston v. Martin*, 5 Mas. 499.) Nor is the fact to be overlooked that the judge who heard the testimony, in refusing the motion for a new trial, approved the verdict of the jury. In such case, it has not been the practice of this court to interfere, nor if such was the practice, are the damages given so excessive as to justify our interference. Many larger verdicts for less injuries have been sustained by the courts.

Thus far the cases have been considered together, but the point is made in the administrator case that no earning power was proven on the part of the deceased. This is based on the inference that the deceased was a wealthy man, living on his income. Under the statute, the age and sex, the general health and intelligence of the deceased, his habits and capacity, mental and physical, to earn and acquire property, are all to be considered. The deprivation of his affection and society cannot be taken into account. This would include skill in the management of wealth, or capacity to manage affairs, which would be of advantage to an estate, and the loss of which would prove a detriment to it.

In view of all the circumstances, we are unable to say there was error, and must affirm the judgments, or judgment in both cases.

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[Filed June 18, 1892.]

GEORGE CONN v. VIRGIL CONN.

MATURED ACCOUNTS—INTEREST.—Unless an account be settled or matured, interest will not be allowed thereon in the absence of an agreement therefor.

PARTNERSHIP—PAST SERVICE FOR FIRM—ADDITIONAL COMPENSATION.—After a service is rendered for a firm, the compensation for which is fixed by contract, it is not competent for one member of the firm, without the consent of the other, to subject the firm to liability for additional compensation for the service already rendered.

EQUITY—UNLIQUIDATED DAMAGES—EQUITABLE COUNTERCLAIMS.—Claims for unliquidated speculative damages, not being such as would sustain a suit between the parties, are not proper equitable counterclaims.

Lake county: L. R. WEBSTER, Judge.

Defendant appeals. Affirmed.

The object of this suit is the specific performance of a certain agreement between the parties, and also an accounting between the plaintiff and defendant as partners. Both causes of suit arise out of the same agreement. The answer alleges performance of that part of the agreement which is sought to be specifically enforced, which performance occurred after the commencement of the suit, and this is admitted by the reply. The answer also admits the necessity of an accounting. The only questions tried in the court below were those arising upon the accounting.

Wm. R. Willis, for Appellant.

Watson, Hume & Watson, for Respondent.

STRAHAN, C. J.—This cause was referred to W. L. Colvig, Esq., to take and report the evidence to the court, together with his findings of law and fact. Upon the filing of the report, numerous exceptions were made both by the plaintiff and defendant, and the same were so modified that a decree was entered against the defendant for the sum of four hundred and ten dollars and ten cents, from which the defendant has brought this appeal. The referee found that

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the plaintiff should be charged in the account, thirty-one thousand four hundred and fifty-eight dollars and eighty-two cents, and credited twenty-five thousand two hundred and seventy-eight dollars and ninety-four cents, leaving a balance due from him to the firm of six thousand one hundred and seventy-nine dollars and eighty-eight cents; and the defendant should be charged fifteen thousand six hundred and nine dollars and twenty-one cents, and credited nine thousand six hundred and forty-nine dollars and thirty-eight cents, leaving a balance due from him to the firm of five thousand nine hundred and fifty-nine dollars and eighty-three cents; and that the plaintiff owed the firm two hundred and twenty dollars and three cents more than the defendant owed it. And he further found for the defendant, on account of the first and second counterclaims pleaded in his answer, to the amount of one thousand and seventeen dollars and eleven cents on the first counterclaim, and eight hundred dollars on the second, which, with one-half of the balance of two hundred and twenty dollars and three cents, found against the plaintiff, amounted to the sum of one thousand nine hundred and twenty-seven dollars and thirteen and one-half cents, for which he recommended a decree in favor of the defendant.

The court, after hearing the same, sustained plaintiff's exceptions to four of the findings of the referee: that which allowed defendant credit for one hundred and sixty-four dollars, back salary paid J. C. Conn; that which charged plaintiff eight hundred and seventy-six dollars and forty-five cents on account of taxes on his excess of capital; that which finds for defendant one thousand and seventeen dollars and eleven cents, damages for plaintiff's refusal to lease the mill; and that which finds for defendant eight hundred dollars, damages for plaintiff's refusal to join in repairing the mill; and, as a result, re-stated the account, so that plaintiff was charged thirty thousand five hundred and eighty-two dollars and thirty-seven cents, and credited

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twenty-five thousand two hundred and seventy-eight dollars and ninety-four cents, leaving a balance due from him to the firm of five thousand three hundred and three dollars and forty-three cents; and defendant was charged fifteen thousand six hundred and nine dollars and twenty-one cents, and credited nine thousand four hundred and eighty-five dollars and thirty-eight cents, leaving a balance due from defendant to the firm of six thousand one hundred and twenty-three dollars and eighty-three cents, being eight hundred and twenty dollars and forty cents more than the balance, for one-half of which sum (four hundred and ten dollars and ten cents) the court directed a judgment in favor of the plaintiff against the defendant, and disallowed each of said counterclaims, and overruled all of defendant's exceptions and all of plaintiff's, except those above stated.

The contention between these parties is as to sundry items which go to make up the aggregates found by the referee, and present mainly questions of fact. As to these, the evidence is conflicting, and we could only say approximately which party is right and which wrong were we to enter into an examination of the evidence and attempt to restate the account. We have carefully read the evidence, and examined the ruling of the court below on each contested item, and are disposed to think the weight of the evidence is with the court's finding. The disputed items are, plaintiff's claim, allowed by the referee and court, for interest on his excess of capital in the business; defendant's claim that plaintiff shall be charged with the taxes on this excess, which was allowed by the referee and disallowed by the court; defendant's claim for interest paid by him to J. C. Conn on his account, disallowed by the referee and court; defendant's claim for one hundred and sixty-four dollars, back salary paid J. C. Conn, allowed by the referee and disallowed by the court; defendant's claim for receipts of postoffice, disallowed by the referee and court; defendant's claim that plaintiff should pay for a wagon belonging to

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the firm, disallowed by the referee and court. It is sufficient to say that there was an agreement on the part of the defendant that the plaintiff should have interest on the amount of capital invested by him in excess of the defendant, and there was no agreement as to who should pay the taxes on said excess. Besides, there is no satisfactory evidence that the firm paid taxes on this excess. A part of the firm's capital was borrowed from the plaintiff; and in the absence of an agreement to that effect, we know of no law that would subject the plaintiff to a liability to the firm for taxes paid on such borrowed capital. It does not appear that J. C. Conn's account was a settled or matured account, or that there was an agreement, expressed or implied, that he should be allowed interest thereon; nor does it appear that the firm was in any way responsible for the one hundred and sixty-four dollars paid by the defendant to J. C. Conn for back salary. Said J. C. Conn's salary was fixed by contract; and after the service had been rendered, it was not competent for one member of the firm, without the consent of the other, to subject the firm to a liability for additional compensation. In such case, the firm is not liable. The other two items were disallowed by both the referee and court, and need not be particularly noticed.

The defendant's counter-claims are both for damages, unliquidated and speculative. Upon neither of them could a suit have been maintained by the defendant and against the plaintiff. (Hill's Code, § 393.) They are, therefore, not counter-claims in equity, but matters of legal cognizance. But in addition to this, the second counter-claim seems to be based on the theory that if one tenant in common will not repair, or consent that his co-tenant shall repair, he may sue such co-tenant in equity for damages. We deem a more particular discussion or statement of these matters unnecessary.

Statement of the case.

In every view, we think the decree appealed from is correct and must be affirmed.

[Filed June 18, 1892.]

MINERVA ANN DICE v. MARY E. McCAULEY ET AL.

DISPUTED BOUNDARY—LEGAL TITLE—STARE DECISIS.—Where, in a suit under the statute, it appears from the pleadings and evidence that the only controversy between the parties is the legal title to a strip of land claimed to have been acquired by adverse possession, the complaint will be dismissed, and the parties required to try the legal title at law. *Love v. Morrill*, 19 Or. 545, followed and approved.

Polk county: R. P. BOISE, Judge.

Defendants appeal. Reversed and dismissed.

This suit is brought by the plaintiff against her daughter, Mary E. McCauley, and her husband. Its alleged object is to ascertain and settle a disputed question of boundary between the lands of plaintiff and defendants. E. C. Dice in his lifetime settled upon a tract of land in Polk county, Oregon, as his donation land claim. The plaintiff was his wife. One-half of said claim inured to her under the donation law. Mary E. McCauley has succeeded to all the estate and interest of E. C. Dice in said claim.

Upon the trial, the court below made the following findings of fact and law: "Now, on this twentieth day of May, 1891, this cause came on for hearing; W. H. Holmes appearing as counsel for the plaintiff, and Daly, Sibley & Eakin, and W. S. McFadden, appearing as counsel for the defendants; and after hearing the allegations and proofs of the parties, and arguments of counsel, the court finds as conclusions of fact—first, that there is a controversy as to the location of the line between the land of the plaintiff and the defendants; second, that the evidence does not show that the plaintiff and E. C. Dice, her late husband, agreed between themselves to establish between their respective

22 456
23 306
30* 160
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Statement of the case.

lands of their donation land claim any line other than established by the United States patent, which conveyed their said donation land claim to them, or that plaintiff once after agreed to any other line; third, that the true line between the lands of the plaintiff and defendant is a straight line running nearly east and west parallel with the south line of said donation land claim, from such points on the east and west boundaries thereof as to divide the said claim into equal parts. As conclusions of law, the court finds that the plaintiff is entitled to have her said true line established by this court, and that commissioners be appointed to establish the same. It is, therefore, ordered and decreed by the court that a straight line, running nearly east and west parallel with the south line of the donation land claim of E. C. Dice and wife, is the true boundary line between the said lands of plaintiff and defendant. And it is further ordered that W. P. Wright, James A. Dempsey, and F. A. Patterson, be and are hereby appointed commissioners to ascertain and mark said line; and said commissioners are hereby directed to go out upon the said lands of said parties and establish and mark out upon the grounds, by proper marks and monuments, said boundary or dividing line between the plaintiff and defendant, and report their doings at the next term of this court." Thereafter, on the eleventh day of December, 1891, said referees having made their report, the court entered the following decree thereon: "Comes now (December 11, 1891,) said cause to be heard upon the motion of the plaintiff to confirm the report of the referees heretofore appointed to establish the line between the lands of the said parties as disclosed by the pleadings, and for a final decree establishing said reported line as the true line dividing the said lands of the parties, and the motion of the defendants to set aside said report and refer the said matter of surveying and establishing said line; and the court having fully considered the same, and being advised as to the facts and law

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pertaining thereto, overrules the said motion of defendants. It is, therefore, ordered, adjudged, and decreed by the court that the said report be and the same is hereby confirmed, and the line dividing said lands is decreed by the court to be a line running east and west parallel with the south boundary line of the donation land claim of E. C. Dice and wife, No. 55, in township 8 south, range 4 west of the Willamette meridian, and seventeen and forty-three one-hundredths chains north therefrom. It is further decreed by the court that the plaintiff have and recover from the defendants her costs and disbursements incurred in the prosecution of this suit, which said costs, etc., are allowed and taxed at \$—, and that execution issue to enforce this decree.

“R. P. BOISE, Judge.”

From this decree this appeal was taken.

Daly, Sibley & Eakin, John Burnett, and W. S. McFadden,
for Appellants.

Bonham & Holmes, for Respondent.

STRAHAN, C. J.—Under section 4 of the donation act, E. C. Dice in his lifetime became a settler upon the donation claim described in the pleadings, and by virtue thereof, and upon compliance therewith, became entitled to said tract of land so settled upon, “one-half to himself, and the other half to his wife, to be held by her in her own right”; and the surveyor-general was required to designate the part inuring to the husband and that to the wife, and enter the same on the records of his office; and that line, when ascertained, would be the true dividing line between the plaintiff’s and defendants’ lands, unless something else intervened to affect it. The contention of defendants is that, twenty or more years ago, E. C. Dice and the plaintiff agreed upon a conventional line running between the house and barn, and which was always observed by maintaining a turning row on said line, and that thereafter each claimed

Points decided.

and occupied up to that line without a question. In this view of the subject, the only question in the case is, whether or not there was such an understanding, which, if acted upon for a sufficient length of time, would bar an entry. This question is purely a legal one, and ought to be tried by a jury. This is not a case in which the place where the true line was run upon the ground has been lost by the removal or destruction of monuments, or for any cause cannot be ascertained or is not known, but it is one where the owners of the tract, for reasons that were satisfactory to themselves at the time, are alleged to have established another and different line by agreement, and which was acted upon by each of them by actual occupancy up to such conventional line for more than twenty years. The defendants' evidence is all directed to this point, and it certainly does tend very strongly to establish this contention. Under this aspect of the case, the only contention there is between the parties is, which owns the strip of land lying between the line made by the surveyor-general and the conventional line alleged to have been established by the parties. This brings the case within the principle applied by this court in *Love v. Morrill*, 19 Or. 545, which is decisive of this case.

Let the decree appealed from be reversed and the suit be dismissed.

[Filed June 18, 1892.]

D. F. CAMPBELL v. E. E. MCKINNEY.

SUIT FOR ACCOUNTING—FACTS EXAMINED—CASE IN JUDGMENT.—The court having examined the evidence, and re-stated the account between the parties, finds there was no error in the decree of the court below.

Marion county. R. P. BOISE, Judge.

Plaintiff appeals. Affirmed.

L. L. McArthur, for Appellant.

W. M. Kaiser, and Tilmon Ford, for Respondent.

Opinion of the court—BEAN, J.

BEAN, J.—This is a suit for an accounting, and arises out of the following facts: On April 3, 1886, plaintiff being in failing circumstances, and unable to promptly pay his debts, agreed with defendant, that, in consideration of defendant's assuming and paying certain of his debts, and furnishing money to improve and carry on his farm, he would convey to defendant the farm as security for the amount of the debt so assumed and money advanced. In pursuance of this agreement, the farm was conveyed to defendant, and he assumed and paid the following debts of plaintiff: note and mortgage of Mrs. L. A. Cox, three thousand six hundred and fifty dollars; note of Mrs. S. E. Smith, six hundred and fifty dollars; note of J. Q. Wilson, seven hundred and thirty-five dollars; judgment of J. L. Follansby, one hundred dollars, and purchasing title of Q. A. Grubbe, sixty-five dollars,—making a total of five thousand three hundred and twenty-five dollars. On the same day defendant leased the farm to plaintiff for a term of four years at the annual rental of five hundred and thirty dollars, and it was agreed and so expressed in the lease, that the produce of the farm during the term of the lease should belong to and be the property of the defendant, and should be disposed of by him, the proceeds thereof being credited on the amount of the indebtedness, and interest thereon assumed by defendant, and money advanced for working and carrying on the farm. Under this arrangement, the farm was cultivated until 1889; and to settle the account between the parties, this suit was instituted. From time to time since the making of the agreement in April, 1886, defendant has rendered and delivered to plaintiff itemized statements of the account between them; and some few of the items going to make up the debit side of this account are disputed by plaintiff, but from an examination of the evidence, it seems to us that all the items of this account, except the charge of three hundred and eighty-seven dollars and fifty cents for interest, and of five dollars

paid Mr. Ford for advice, are properly chargeable against plaintiff.

The principal controversy between the parties in this suit, is as to the credit plaintiff should receive for produce delivered, and pasturage and board furnished. There is no controversy as to the quantity of produce delivered; nor is there any dispute but that defendant has properly credited plaintiff with the entire amount received by him from the sale of the same; but it is contended by plaintiff that defendant did not exercise proper care and attention in the sale of the produce, especially the hops, and should therefore be charged with the difference between the amount received and what he should have received, amounting, as plaintiff contends, to about one thousand five hundred dollars. We have examined the entire evidence on this question, and are satisfied that after the hops were delivered to him, defendant exercised all the care, attention, and diligence the law requires or demands in disposing of them, and realizing the best market price, and therefore should only be charged with the amount actually received, except for three thousand one hundred and eighty-two pounds of hops delivered to him in 1887. In this last instance, it appears that plaintiff contracted his entire hop crop for fifteen cents per pound, prior to picking; but at defendant's instance and urgent demand, the contract was cancelled, and the hops delivered to him; and we think, therefore, he should account to plaintiff for the hops at fifteen cents per pound, although, by the exercise of the utmost diligence, he did not realize that sum for them. If he did not desire to assume this responsibility, he should have allowed the contract to stand.

There is a difference of ninety dollars and thirty-nine cents between the parties as to the value of the oats delivered to defendant; and the evidence seems to be in plaintiff's favor on this question. The disputed items in the pasturage account are, pasturing one hundred and fifty head of

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sheep two months, fifteen dollars; keeping twenty steers two years, one hundred and seventy-five dollars, and keeping thirteen head of cows and their increase for four years, three hundred and twelve dollars. By the terms of the lease of April 3, 1886, plaintiff was to pasture and care for the twenty head of steers and the cows and their increase without charge to defendant, receiving as his compensation therefor the milk and butter from the cows and one-half of their increase; and we do not think this provision of the lease was afterward modified, as plaintiff claims. Plaintiff has received by credit on his account, the value of one-half of the increase from the cows, as provided in the lease, and therefore is not entitled to charge for keeping either the steers or the cows. The charge plaintiff makes against defendant for board is evidently a thought that occurred to him after this dispute arose, and is without merit.

On December 5, 1888, by mutual consent of the parties, sixty acres of the farm was sold to one Cone for three thousand six hundred dollars, one thousand dollars in cash being paid to defendant, and the remainder being secured by note and mortgage in defendant's favor, due five years after date, which, in the absence of a showing to the contrary, we must assume is worth its face, and therefore plaintiff was on that day entitled to a credit on the amount of indebtedness assumed for him of three thousand six hundred dollars.

We have concluded defendant is not entitled to interest on the money advanced by him for carrying on the farm, because the value of the produce received by him about equalled the money advanced, and the interest on one would offset the interest on the other; but he is certainly entitled to interest on the money advanced to pay indebtedness, or interest on the face of the indebtedness assumed, which perhaps would be the better way of stating the account. But however we state the account, giving plaintiff the benefit of all the items above suggested, as well as disallowing

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the claim of two hundred and eighty-eight dollars on the Cone bond, there still remained due defendant at the time of the rendition of the decree in the court below a sum equal if not in excess of the amount allowed, and the decree is affirmed.

[Filed July 2, 1892.]

WM. FRIZZELLE v. O. R. & N. CO. ET AL.

EJECTMENT — EVIDENCE — ACT OF CONGRESS.—In defense of an action of ejectment by a settler on government lands against a railway company to recover the land whereon the company's road is located, it is competent for the defendant to show that prior to the plaintiff's settlement, it complied with the requirements of the act of congress of March 3, 1875, granting to railroad companies the right of way over the public lands; and it is sufficient if, from an inspection and construction of the documents offered in evidence, it appears that such compliance was prior to the settlement, although the exact date does not appear.

Wasco county: W. L. BRADSHAW, Judge.

Defendants appeal. Reversed.

This is an action of ejectment. The substance of the plaintiff's complaint is as follows: That the plaintiff is and at all the times hereinafter stated has been the owner in fee simple of that certain tract or parcel of real property described as lots one and two and the south half of the southeast quarter of section thirty-four in township three north, range eight east; Willamette meridian; that the Oregon Railway & Navigation Company is and at all the times hereinafter stated was a corporation existing under the laws of, and doing business in, the state of Oregon; that heretofore, to wit, about the — day of —, 1881, the defendant, the Oregon Railway & Navigation Company, unlawfully entered upon and took possession of that certain portion of the tract hereinbefore described, consisting of a strip through said premises one hundred feet wide, lying along the present line of the Oregon Railway & Navigation Company's line of railroad track, where the same crosses

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the said premises, and being and extending fifty feet on each side of said track, and ousted the plaintiff from the possession of said last described premises; that ever since said time, the said defendant, the Oregon Railway & Navigation Company, and the defendant, the Oregon Short Line & Utah Northern Railway Company, have unlawfully withheld and detained the possession of the said premises from the plaintiff, and still unlawfully withhold and detain the same, wherein and whereby the plaintiff has been damaged in the full sum of one thousand dollars. Then follows a prayer for the recovery of said premises and one thousand dollars' damages. The defendants severally demurred to the complaint, but the record fails to disclose what disposition was made of the demurrers. The answer denies an entry in 1881, but alleges an entry in 1880 by the Oregon Railway & Navigation Company and continuous and exclusive possession and occupation since that time by the defendant and its co-defendant, which last-named defendant entered as the tenant of the Oregon Railway & Navigation Company about the first day of August, 1889. Said answer alleges an adverse holding by the said first-named defendant and its tenant for more than ten years next before the commencement of the action. The answer also denies the plaintiff's title, and also the unlawful entry or possession by defendants, and pleads title in the Oregon Railway & Navigation Company. The answer also alleges that the Oregon Railway & Navigation Company acquired said strip of land under the act of congress granting the right of way over the public lands of the United States to all railways complying with said act. The reply denied the new matter in the answer.

Upon the trial, the plaintiff introduced his patent from the United States covering said land, and gave some evidence tending to show the value of the use and occupation, and rested. The defendants then undertook to show that while the land in controversy was yet public land of the

Opinion of the court—STRAHAN, C. J.

United States, the Oregon Railway & Navigation Company surveyed its line of road across the same, and thereafter in all respects complied with the act of congress granting the right of way to all railroads afterwards constructed over the public lands. The principal exceptions relied upon were taken to the ruling of the court excluding from the consideration of the jury certain documentary evidence offered on the part of the defendants, which will be more particularly noticed in the opinion. The plaintiff recovered judgment for the recovery of the land and a judgment against the defendant, the Oregon Railway & Navigation Company, for six hundred dollars, damages. From this judgment this appeal is taken.

W. W. Cotton, and Zera Snow, for Appellants.

A. S. Bennett, for Respondent.

STRAHAN, C. J.—The complaint is a wide departure from the requirements of the statute (Hill's Code, § 318) declaring what the complaint in this class of actions shall contain, but inasmuch as no question was made as to its sufficiency, the same will not be further noticed. The defendants attempted to show title in the Oregon Railway & Navigation Company under the act of congress of March 3, 1875. The first section of that act provides that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the congress of the United States, which shall have filed with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of its said road. * * * Section four of said act provides that any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and,

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if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office of the district where such road is located, a profile of its road; and upon approval thereof by the secretary of the interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way. (18 Stat. at Large, 482.)

For the purpose of sustaining the issues on the part of the defendant, the Oregon Railway & Navigation Company, the resident engineer of said company was called as a witness and gave evidence tending to prove that he was one of the engineers of said defendant in the year 1879; that he aided in making the preliminary survey of the line of said road in 1879; that the same was surveyed through the land described in the complaint, which is the same line where said road was located and constructed; that said line was marked by stakes driven in the ground, and the final location of said road was made on said line in the spring or summer of the following year, and that defendant's exhibit No. 1 correctly shows the location of said road as it was constructed.

H. S. Hurlburt, another witness connected with the construction department of said Oregon Railway & Navigation Company, testified in substance that he was one of the engineers of said defendant, and was engaged in laying out the work of construction; that a portion of the road had been constructed and in operation in the summer and fall of 1880 from The Dalles to Celilo, and at other points east thereof; and work of construction was going on in the fall of 1880 below Cascade Locks and west thereof; but that no construction was done over the land in controversy until the month of March, 1881, at which time construction work began over lots three and four. The defendants also introduced various exhibits, numbered from two to eight inclusive, tending, as was argued at the trial, to prove

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compliance by the Oregon Railway & Navigation Company with said act of congress. All of these exhibits were rejected except number six, and an exception properly taken to each of said adverse rulings. These exceptions present the main contention on this appeal. Exhibit 2 consists of copies of said defendants' articles of incorporation, and proofs of the organization thereunder, and supplementary articles of incorporation certified from the department of the interior. No. 3 is a profile of the road, certified from the general land office at Washington. No. 4 is the same profile, certified from the Oregon City land office. No. 5 is the township plat with a profile of the road marked thereon. No. 6 was admitted, and is an extract from the tract book, showing entry of the plaintiff under date of application, August 13, 1881, under settlement of May 13, 1881. No. 7 is a copy of the commissioner's letter of May 29, 1883, cancelling the entry of Wm. Frizzelle. No. 8 is a copy of the commissioner's letter F, of October 14, 1880, notifying the register and receiver of the approval of the maps filed with the secretary of the interior, which approval was dated September 28, 1880. What particular reasons the trial court had for rejecting this documentary evidence, does not appear from the record; but it may be assumed that they were the same that were made by plaintiff's counsel upon the trial here; and that is, there is no evidence tending to show at what particular time these various exhibits were filed, and therefore it is not affirmatively shown that the said defendants' rights had attached at the time of the plaintiff's settlement. None of the papers was objected to on the ground that they were not properly certified, and no such objections were taken in this court. The Oregon Railway & Navigation Company's articles of incorporation were signed and acknowledged on the twelfth day of June, 1879, and on the next day filed in the office of the secretary of state. On the twenty-fourth day of November, 1879, the secretary

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of state authenticated the copy used to prove the corporate existence of the defendant. It also appears that on the thirteenth day of June, 1879, a copy of said articles of incorporation were filed with the county clerk of Multnomah county, Oregon, and he also authenticates the copy from his office. His certificate bears date December 31, 1879. The assistant secretary of the defendant corporation also authenticates the same copy by his certificate dated January 27, 1880. On the same day said assistant secretary certifies that the organization of the defendant corporation was complete. The directors of said corporation took and filed the oath of office on the twenty-seventh day of January, 1880, and elected a president and the other necessary officers. On the fourteenth day of October, 1880, the acting commissioner of the general land office transmitted to the land office at Oregon City, copies of two maps, the originals of which had been filed by the Oregon Railway & Navigation Company under the right-of-way act of March 3, 1875, with the information that the honorable secretary of the interior had approved the same on the twenty-eighth ultimo, and the land office was directed to follow the instructions given in the circular of June 7, 1880. The copies of the maps transmitted seem to be in all respects such as are required by the act of congress, and are marked "approved subject to any valid interfering rights," and signed C. Schurz, secretary. This approval is dated September 28, 1880.

The plaintiff's settlement on the tract dated from May 13, 1881. His technical contention, therefore, as to the time when these various filings were made at Washington and Oregon City, becomes entirely immaterial, for the reason that it appears that the papers were filed and approved before his settlement. If the defendants' filings antedate his settlement, the particular day on which they were filed is immaterial. At the time of the plaintiff's settlement, the defendant company had located its road over these

Points decided.

tracts of land and fully complied with the act of congress granting it the right of way. The defendants' acquisition, then, was subject to the easement thus acquired, and the court below should have received the evidence offered and told the jury what was its legal effect. It consisted of writings, which it was the duty of the court below to construe and interpret. There were some other questions raised, but their discussion is unnecessary, as the view we take of the evidence offered and rejected will probably be decisive of this case upon another trial.

The judgment appealed from must be reversed, and the cause remanded to the court below for a new trial not inconsistent with this opinion.

[Filed July 2, 1892.]

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GEORGE W. WIMER ET AL. v. ANNA F. SMITH ET AL.

IMPEACHMENT OF WITNESS—WEIGHT OF EVIDENCE.—To show that the reputation of a witness for truth and veracity is bad, does not of itself entirely destroy his testimony where it is intrinsically probable or is corroborated by other evidence. Under such circumstances it must be considered for what it is worth with other evidence; but where it is not supported, it may be utterly disregarded.

WEAKER EVIDENCE—PRESUMPTION OF DISTRUST.—If weaker and less satisfactory evidence be offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

FRAUD—FALSE REPRESENTATIONS—JUDGMENT OF PURCHASER.—A party seeking relief on the ground of fraud perpetrated upon him by means of false representations, must not only clearly prove the fraud, but must also show that he relied upon the false representations; and although such false representations were made as alleged, yet, if, having full means of knowing the truth, he acted on his own judgment in the transaction from which he seeks relief, he cannot complain.

Josephine county: L. R. WEBSTER, Judge.

Defendants appeal. Affirmed.

S. U. Mitchell, and C. W. Cross, for Appellants.

Argument of counsel.

The measure of defendants' damages, which they are entitled to recover, is the difference between the value of the property as it was represented to be, if the material misrepresentation were true, and the value of the property, with the matter of misrepresentation false. (*Harvey v. Hadley*, 87 Cal. 557.)

One who has been drawn into executing a contract by fraudulent representations may affirm the contract after the discovery of the fraud, and notwithstanding such affirmation may sue for the fraud, or may recoup the damages sustained on account of it in an action by the other contracting party on the agreement. (*Whitney v. Allaire*, 4 Den. 554; *King v. Boston*, 7 East, 481; *Cormack v. Gillis*, id. 480; *Kellogg v. Denslow*, 14 Conn. 411; *Boorman v. Jenkins*, 12 Wend. 566; *Waring v. Mason*, 18 Id. 426; *Hoggins v. Beecraft*, 1 Dana, 30; 2 Kent's Com. 5th ed. 480; Long on Sales, by Rand, 213, 219, 240; *Weston v. Downes*, Douglass, 23; *Towers v. Barrett*, 1 T. R. 133; *Payne v. Whale*, 7 East, 274; *Crown v. Carriger*, 66 Ala. 590; *King v. Doane*, 139 U.S. 166.)

If a false representation of a material matter of fact, not patent and open to the buyer's inspection, be made by a party proposing to sell, and the buyer, induced by such representation and relying on its truth, accepts the offer and closes the trade without knowing the falsity of the representation, and is thereby deceived to his injury, the seller shall make good the representation. (*King v. Doane*, 139 U. S. 166.)

Fraud will vitiate a contract; but where the parties to it stand upon an equal footing, the fraud must consist of a false representation of a material fact, and the party to whom it is made not be able by the exercise of reasonable caution and vigilance, to detect its falsity. (*Fahie v. Prassey*, 2 Or. 23; 80 Am. Dec. 401.)

Fraud, accident, or mistake must appear, or equity will not relieve from ignorance of fact. (*Rolfes v. Russel*, 5 Or. 400; *Horrell v. Manning*, 6 Or. 413; *Smith v. Griswold*, Id. 440.)

Argument of counsel.

For the essential allegations in complaint for false representations, see *Smith v. Cox*, 9 Or. 327.

Knowledge of the falsity must be alleged and proved in action at law. (*Willamette Co. v. Gordon*, 6 Or. 175.)

They must have been asserted as facts, and not opinions, and have been known untrue in an action at law. (*Caples v. Steel*, 7 Or. 492.)

If the fraud be such that, had it not been practiced, the contract could not have been made, or the transaction completed, then it is material to it. (*Jackson v. Armstrong*, 50 Mich. 65.)

One who obtains land in a trade, and before doing so goes upon and looks at it, has nevertheless a right to show that he was misled by the representations of the other party. (*Fishback v. Miller*, 15 Nev. 428.)

The rule of *caveat emptor* applies only when buyer and seller have equal opportunities of knowledge, and where the defect complained of is patent and obvious to the senses. This was a case where, in a sale of an interest in a mine, the depth of a shaft and the size of a ledge in the bottom of the shaft, were misrepresented by a vendor. (*Smith v. Richards*, 13 Pet. 26, 2 Parsons, Cont. 773.)

If, however, the plaintiff mainly and substantially relied upon the fraudulent representation, he will have his action for the damage he sustains, although he was in part influenced by other causes. (*Safford v. Grout*, 120 Mass. 20.)

In an action for false representations, it is sufficient if such representations materially influenced the conduct of the plaintiff, though they were not the sole predominant inducement. It is not necessary that the false representations should have been the sole or even the predominant motive; it is enough if they had material influence upon the plaintiff, although combined with other motives. (2 Pom. Eq. Jur. §§ 873-904.)

Argument of counsel.

P. P. Prim & Son, and H. K. Hanna, for Respondents.

The alleged misrepresentations and fraud set up in defendants' answer being denied by the plaintiffs, the burden of proof rests on the defendants to establish them to the satisfaction of the court by a preponderance of the evidence, and failing in this, the whole of said defense should and must be disregarded and held for naught. (Greenl. Ev. § 74; *Stevenson v. Marony*, 29 Ill. 532; *McClure v. Purcell*, 6 Ind. 330.)

The purchaser is not justified in relying on the vendor in any of the following cases: (a) When before entering into the contract the purchaser actually resorts to the proper means of ascertaining the truth and verifying the statements made by the vendor, as was done in this case by Wadleigh; (b) when having an opportunity of making such examination, the purchaser is charged with all the knowledge which he would and could have obtained if prosecuted with diligence; (c) when the means of acquiring the true condition of the subject matter of the purchase is equally in the possession of both parties. (2 Pom. Eq. §§ 890-893; *Slaughter's Admr. v. Gerson*, 13 Wall. 379; 3 Wait's A. & D. 441; *Johnson v. Taber*, 6 Seld. 319.)

Prompt disaffirmance of the contract is required of the party deceived by misrepresentations upon the discovery of the fraud. (2 Pom. Eq. § 897.)

The defense is based upon alleged false representations, made by the vendors, to induce Wadleigh to purchase the property, and not upon any attempt at concealment or to prevent a thorough investigation of the true condition and situation of the mine. Where the purchaser relies upon fraudulent representations to prevent inquiry, the means by which he has been induced to forbear inquiry, must be specially alleged as well as proved. (*Parker v. Moulton*, 114 Mass. 99; 19 Am. Rep. 315.)

Opinion of the court—LORD, J.

LORD, J.—This is a suit to foreclose a mortgage, executed and delivered to plaintiffs by the defendant Anna F. Smith through the defendant W. I. Wadleigh, her duly authorized attorney in fact, conditioned for the payment of six promissory notes of the same date, and described in the complaint; and also for the payment of reasonable attorney fees. It is alleged that these notes were executed and delivered to the plaintiffs as aforesaid for the payment of thirty-eight thousand one hundred and sixty-eight dollars and ten cents, the same being the amount of a balance due and unpaid by the defendant Anna F. Smith on the purchase price of certain mining properties and water ditches connected therewith, set out and described in the complaint and mortgage, which had been sold and duly conveyed by the plaintiffs to the said Anna F. Smith, through her said attorney in fact, about two years prior thereto. ✓

The defendants answered admitting the execution of the notes and mortgage, based on the consideration alleged in the complaint; but as a defense to the enforcement of said notes and mortgage, alleged that the defendant Wadleigh had been induced to purchase the mining property, ditches, etc., at the agreed price of seventy thousand dollars, by false and fraudulent representations as to the grade upon which the upper and most valuable portion of said mining grounds in Butcher gulch, in the vicinity of Simmons' shaft, could be mined and worked by hydraulic process; that the said Wadleigh relied upon said false representations in making said purchase, and that all of said upper portion of Butcher gulch was worthless, for the reason that it could not be bottomed and worked by means of hydraulic pipes and giants in the represented grade; and that by reason thereof the defendants had been damaged in the sum of sixty-one thousand five hundred and two dollars and fifty-eight cents, for which they asked a decree against the plaintiffs. These affirmative allegations of the answer were put in issue by the denials of the reply. ✓

Opinion of the court—LORD, J.

To aid in the explanation of the case, there are some facts which need to be outlined that are not disputed. It appears from the evidence that the plaintiffs were the owners of the mining grounds and ditches connected therewith situated near Waldo in Josephine county, commonly known as the Wimer mines; that W. I. Wadleigh, an experienced hydraulic miner, visited that country and place in the month of May, 1888, in company with a man by the name of Thomas Bailey, for the purpose of prospecting and purchasing some gravel mines; that while there, meeting with George W. Wimer, one of the plaintiffs, their attention was attracted to the Wimer mines, and negotiations were commenced for the purchase of the same; that while such negotiations were in progress, the said Wadleigh, assisted by the expert Bailey, spent several days in examining and prospecting the mining grounds and ditches, and on the twenty-second day of May, 1888, thereafter, he made an oral agreement with George Wimer to purchase the same for the agreed price of seventy thousand dollars, and at that time gave his check to George W. Wimer for two hundred and fifty dollars to bind the bargain; that between the twenty-second day of May, 1888, and the eighteenth day of July, 1888, the defendants paid on the purchase price of said mine the sum of thirty-four thousand four hundred and fifty dollars, including two thousand two hundred dollars allowed as discount; that on the last date aforesaid a written memorandum of agreement was entered into between the plaintiffs and defendant Anna F. Smith by her attorney in fact, W. I. Wadleigh, by which, *inter alia*, she agreed to execute and deliver certain promissory notes for the balance due on the purchase price of said mine; and to secure the payment of the same, she agreed to execute and deliver to plaintiffs a good and sufficient mortgage on said mining grounds and certain improvements thereon; that in pursuance of said agreement, the notes and mortgage aforesaid were executed and delivered

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and that during all the times from and after July, 1888, up to the time of the commencement of this suit, the defendants have been in possession of and working said mining property.

The defense is based upon fraudulent representations, alleged to have been made by the plaintiffs to induce Wadleigh to purchase the mining property. These alleged false representations being denied by the plaintiffs, the burden of proof rests upon the defendants to establish them by a preponderance of the evidence. The counsel for the appellant recognizes this as the correct rule of law, applicable to the issue, and that the main question in the case is, as to whether George W. Wimer did or did not make the fraudulent representations alleged. The facts show that Wadleigh, acting as the agent for his sister, Anna F. Smith, conducted all the negotiations on behalf of the defendants, and that George W. Wimer, as the agent for himself and Wm. J. Wimer, conducted all the negotiations for the plaintiffs. Wadleigh testified that George W. Wimer made the fraudulent representations alleged, and George W. Wimer testified that he did not make such alleged misrepresentations. It is admitted that if the evidence of these two witnesses is entitled to equal credit, there is no preponderance of evidence, and the defense set up must fail.

The contention for the appellant is, that where two witnesses swear directly contrary to each other, and one of them is impeached by evidence that his general reputation for truth is bad, the preponderance of the evidence is then in favor of the other party. To effect this result, or to make the evidence preponderate in support of the allegation of fraudulent representations, the defendants have sought to impair the value or weight of the testimony of George W. Wimer by evidence that his reputation for truth is bad. Quite a number of witnesses who had been the neighbors of the defendant George W. Wimer several years

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before, at the time of, and after the alleged purchase of the mining property, testified that they were acquainted with his reputation for truth in the neighborhood where he had resided, and that it was bad. To sustain his reputation, the plaintiffs introduced quite a number of witnesses; but the large majority of them never resided in the vicinity where the Wimers resided when the transaction occurred, or their residence near them was at some period antedating the trial many years. Some one or two others testified that his reputation for truth was good. It must, however, be noted that some of the witnesses, introduced by the defendants to impeach the reputation of George W. Wimer, were hostile in feeling toward him; and some one or two were objectionable in other particulars, which need not be noted in detail. Still, it is quite probable, judging from the evidence in the record, that his reputation for truth in the community where he had resided when the mining property was sold, was bad among his neighbors; and if the case depended entirely upon his testimony, considered apart from other evidence or circumstances in the case, we might feel bound to disregard it.

In considering the weight to be attached to the testimony of an impeached witness, the rule is the same in equity as at law. In either case, the only object of an inquiry into the character of a witness is to ascertain whether his statements are entitled to credit. In equity, the facts constituting fraud are found by the court; but a court of equity is not justified in finding such facts upon any less or different kind of proof than would be required to satisfy a jury. Where the facts depend entirely upon the testimony of an uncorroborated witness, whose credibility is plainly impeached, a court or jury would be authorized to disregard his testimony; but even where it is shown that a witness has a bad reputation for truth, his evidence is not necessarily destroyed, but is to be considered under all the circumstances described in the evi-

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dence, and given such weight as the trial tribunal believed it entitled to. "Such witnesses," said BEASLEY, C. J., "are to be relied on in any judicial proceeding, only so far as their testimony is intrinsically probable, or is corroborated by circumstances." (*Adams v. Adams*, 17 N. J. Eq. 334.) So that a court is not bound to disregard the evidence of an impeached witness, but it should be compared with the other evidence and facts proved in the case, and given such weight as it is entitled to under the circumstances. The only evidence tending to prove the alleged false representations in the sales of the mining property is that of the defendant Wadleigh himself. He swears that the plaintiff George Wimer made such false representations to him at Waldo during the negotiations of the trade, in the presence of Thomas B. Bailey, his mining expert; but George Wimer swears directly and positively that he made no such representations to him. The burden of proof is on the defendants; and it is indispensable to their defense that the false representations charged should be proved. It is clear, if such representations were made in the presence of Bailey, in view of their materiality and importance, that he would be likely to have a distinct recollection of them, and would be able to give such evidence in respect to them as would corroborate the testimony of Wadleigh on this vital matter. Yet Wadleigh did not produce his evidence at the trial, nor is there any showing of any effort made by him to procure it by deposition, or otherwise, or to account for its absence, notwithstanding Bailey resided in the adjoining State of California, and the place of his residence was known to the defendant Wadleigh.

Under such circumstances, having failed to produce Bailey's evidence in corroboration of his own evidence in a matter of such vital importance to his defense, is not the court authorized to draw the inference that Bailey's evidence, if produced, would be adverse to him, or would be corroborative of the testimony of the plaintiff Geo. Wimer?

Opinion of the court—LORD, J.

In law, the jury may draw unfavorable inferences from a party's failure to call witnesses who have knowledge of material facts. Even in criminal cases, a failure to produce proof, when in the power of the party, is recognized as proper to be considered by the jury. The case of *Seward v. Garlin*, 33 Vt. 592, tends to illustrate the principle involved. There, the court, in commenting upon the course a party would be ordinarily expected to pursue when he had a witness by whom he could support his own testimony upon a material point, said, by POLAND, C. J.: "Clearly nothing else than that he should call such witness to give his testimony in corroboration of his own. Any failure to do this could hardly happen without some motive; and in the absence of any other being shown, the almost irresistible conclusion would be that he feared at least that the witness would not support his other testimony, and thus have the effect to create more or less doubt and discredit of such party's case." (*Whitney v. Bailey*, 4 Allen, 173.) SHERWOOD, C. J., said, in *Baldwin v. Whitcomb*, 71 Mo. 658, that "the presumption which such a failure to introduce testimony produces is always unfavorable toward the party thus failing, as numerous authorities show." And in that case, it was held that the failure of a party, against whom fraud is charged, to produce as witnesses persons who are alleged to have participated in the fraud, and who are within reach, will raise a presumption in favor of the charge. (Bump, *Fraud*. Conv. 53.) Of course, what effect is to be given to the failure of a party to produce such evidence, would depend upon all the circumstances of the case; but when wholly unexplained, it is a matter to be considered, and such effect given to it as the court or jury should deem it entitled to.

It is alleged and claimed that the most valuable portion of the mining property is located about the upper portion of what is known as Butcher gulch, and that there was at the time of the sale a shaft sunk near the center of it

Opinion of the court—LORD, J.

known as Simmons shaft, sixty feet deep to bedrock. Wadleigh testifies that Wimer represented during the progress of the negotiations that the flume, when continued to the Simmons shaft on the established grade of one and one-fourth inches to the box, would strike the Simmons shaft four feet in the bedrock, and that the whole of the upper portion of Butcher gulch could be worked off with pipes and giants; that two competent surveyors had ascertained and reported to the plaintiffs that the grade line of said flume would strike four feet lower than the bottom of Simmons shaft; that he believed such representations, and relied upon them when he made the purchase of the mining property in question, when the fact was, as he subsequently discovered, and George Wimer well knew, that the upper portion of Butcher gulch could not be bottomed and worked on the established grade of their flume. In all other particulars, the testimony of Wadleigh and Wimer substantially agree. Wadleigh admits (as Wimer testifies) that Wimer was sick, confined to his room, and unable to show Bailey and him the mining property; but that he told them to go to the foreman in the mine, obtain pick, shovel, and pan, and investigate and prospect for themselves. It is clear that every facility was afforded them to examine the property and satisfy themselves in respect to it. Before purchasing the property, they spent several days in making the examination, and prospecting it. The Simmons shaft was in plain view, but they did not prospect any of the gravel in that vicinity. They were both experienced miners, especially Bailey, who is an expert, and understood the hydraulic requisites of such a mine. Upon the established grade, it is conceived that it would not have been a difficult task to ascertain whether, when extended to the Simmons shaft, it would strike four feet in the bedrock or seven feet above it; but Wadleigh testifies that he "made no examination of the shaft. I found it full of water; I couldn't get in it; I found it so the second

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day; it was full up to the boards,—right up,—never was otherwise." Upon this matter, so material, he accepted and relied upon the statements of George Wimer, when he made the purchase. Wimer testifies that he never made such representations; that, so far as he could, he afforded Wadleigh and his expert, Bailey, every facility to examine the mine; that "he made no representations whatever, for he didn't ask me about it, there was nothing said about the shaft—nothing at all. I wasn't out of bed while he was there, that is, to be out of my room. * * * I told him to go prospect until he was satisfied; that the boys would show him the mines, where to prospect, and show him the locations," etc. In a word, the effect of his evidence is that Wadleigh purchased the mine after several days' examination of it, upon his own judgment, and without relying upon the representations of any one. As to the leveling made by the two engineers, Wimer testifies: "I don't know anything about that survey at all. * * * I wasn't in the country." Q.—"There has been some evidence offered that a survey was made for your father, after you had entered into possession, and Simmons, made by the younger Howard, or leveling made to the Simmons shaft by him. Did you ever know, or did any one ever tell you what the result of that leveling was?" A.—"No, sir; he never told me anything about what the result of it was. I never had any level made, and I never heard anything about it."

Howard, one of the engineers, to whom this evidence refers, testifies that his notes show that the mine was owned by J. Wimer and sons and George Simmons when he made the survey. He does not remember whether he made a written report, or reported the result of his survey orally; that according to the survey then made, an inch and a quarter grade would bring the flume nine feet above the bedrock. This evidence is not absolutely irreconcilable with George Wimer's testimony that he did not know any-

Opinion of the court—LORD, J.

thing about the survey, or the result of it; but conceding he was constructively charged with notice of it, or did know it at the time of the purchase, still the fact is not to be overlooked that the allegation is not for the concealment of the result of that survey, but the active misstatement of it. There is, however, the testimony of one or two witnesses as to conversations which they had with the plaintiffs when they were working the mine and before any sale of it was on foot, to the effect that the plaintiffs represented to them that the surveys made by the Howards,—father and son,—substantially agreed; that Simmons was telling it that the ground referred to could not be bottomed on the established grade, but that these surveys made for them showed that the flume grade was four feet in the bedrock, and that it could be bottomed; hence Simmons was telling an untruth. It seems that Simmons was formerly a coowner with the plaintiffs in the mine, and between whom and them, for some cause, a good deal of bad feeling existed. It is claimed that this evidence shows that they knew that the statements of Simmons were true, and that they misrepresented those surveys to refute them, and to establish a false estimate of the value and nature of their mining property; hence their evidence is not to be relied upon, but distrusted; nor are they to be regarded as credible witnesses.

Conceding that this phase of the case tends to impugn and assail the plaintiff's regard for truth, and indicates a disposition that would not hesitate to make the alleged misrepresentations to induce an advantageous bargain or sale, still, if Wadleigh was cognizant of the matter alleged when he bought the property, or did not rely upon them, he cannot now be heard to complain. The evidence shows that during the negotiations for the purchase of the property, and some time prior to the execution of the notes and mortgage, Wadleigh was informed by Simmons that he was the man who sunk the Simmons shaft in the upper portion of Butcher gulch; that the same was sixty feet deep to the

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bedrock, and could not be bottomed on the grade on which plaintiffs' flume was established. Here was direct and positive information in regard to a material matter, the truth of which he could have easily ascertained before the sale was closed, and which constitutes the ground of the alleged misrepresentations. This information did not come from a stranger, nor was it of a speculative character—it came from one who had been a part owner, who sunk the shaft, and whose knowledge of the facts gave significance to his statement; yet Wadleigh paid no heed to it, because, as he states, the plaintiffs had prejudiced his mind against Simmons. Ordinarily, it would be expected, in making a contract of such magnitude as this, that the purchaser would require the vendor to put in writing his representations inducing the sale, and to agree to refund the purchase money, or so much of it as would be just, if those representations proved to be untrue. No such thing was done by the memorandum of agreement entered into between them, notwithstanding the information imparted by Simmons. This precaution would have avoided this litigation; but Wadleigh not choosing to do this, and taking no heed of Simmons' information, this suit is the result; and when he is called upon to prove the alleged false representations, made in the presence of and only heard by one other person except himself and George Wimer, who denies them, he omits or fails to produce the evidence of this man whose testimony ought to be decisive of the truth between George Wimer and Wadleigh. Nor is this all. Wadleigh went into possession in July, 1888, and, in August succeeding, he procured Alexander Watts to make a survey for him from the end of plaintiffs' flume to the Simmons shaft, and aided him in making the survey. Watts reported to him that when the flume was extended up to the Simmons shaft on the established grade, it would strike about seven feet above the bottom of said shaft. But despite this information, he remained in the possession of the mine and operated it as

Opinion of the court—LORD, J.

a hydraulic mine nearly two years prior to the execution of the notes and mortgage, which are the foundation of plaintiffs' cause of suit, without making any complaint. On the contrary, during the whole of this period, the record discloses that he wrote many letters eulogistic of the wealth of the mine, and his complete satisfaction with his purchase. As to the delay in not paying the notes, he assures the plaintiffs that he is "good for the full balance due"; that they "need not worry about the property"; that "I am making arrangements to pay the debt, and shall then ask cancellation of the mortgage," and that "there will be no attempt to throw the claim back upon your hands."

These facts tend strongly to show that Wadleigh was cognizant of the matters complained of; that if Simmons' information as to the shaft was not enough to attract his attention to it, surely Watts' survey confirming it could not be ignored, or fail to excite his suspicion of the fraud alleged, as that survey was made at his own suggestion and aided by him, and imparted information absolutely inconsistent with the alleged misrepresentations; yet, in the face of this information and knowledge, he did not disaffirm the contract, but continued in the possession of the mine, working and taking money out of it for a long period thereafter without the sign of a complaint, until the present suit was threatened to enforce the payment of the notes and mortgage given for the balance due for such property.

In *Vigers v. Pike*, 2 Dr. & W. 1; S. C. 8 Clark & Finn. *562, a bill was filed to compel payment of a residue of the purchase money due on a lease of mines, which the defendants had entered upon and worked for three years. The defendants filed a cross-bill for relief on the ground of misrepresentation and fraud, which was dismissed; and upon appeal taken to the house of lords, the decree was affirmed, the chancellor, Lord COTTENHAM, saying: "In a case depending upon alleged misrepresentations as to the nature and value of the thing purchased, the defendants

Opinion of the court.—LORD, J.

cannot adduce more conclusive evidence, or raise a more effectual bar to the plaintiff's case, than by showing that the plaintiff was, from the beginning, cognizant of all the matters complained of; or after full information concerning them, continued to deal with the property, or even to exhaust it in the enjoyment, as by working the mines."

In the minds of reasonable men, these matters would have been regarded of too vital importance, if they showed false representations, to be ignored or disregarded. When brought to light, as they were, Wadleigh's conduct, under the circumstances, can only be accounted for or reconciled on the hypothesis that those matters constituted no part of his contract; or if they did, and showed that Wimer had been guilty of false representations, he did not rely upon them but was satisfied with his bargain. This conclusion is very greatly strengthened by other evidence tending to show that Wadleigh purchased the mine upon his own judgment, and without relying upon the representations of any one. According to his own statement, Wadleigh was a miner of some experience; and the record discloses that he is a man of much more than ordinary ability. The facts show that he was accompanied by Mr. Bailey, a mining expert, who aided him in the examination of the mine and its water rights; that they spent several days in prospecting and examining it before the sale was consummated, and that the means of obtaining the true condition of the mine was open to them, and every facility afforded to aid them in the investigation, in order that they might satisfy themselves as to its real status. In fact, Wadleigh admits that he bought the mine on his own judgment and Mr. Bailey's, after having thoroughly prospected it. He was asked upon cross-examination: Q.—"Is it not a fact that you did buy this claim on your own judgment, after having made a thorough prospect of it?" A.—"Yes, sir, and Mr. Bailey's judgment." This statement that he bought the mine on

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his own judgment, and not on the representations of others, was made to other witnesses with whom he conversed.

Mr. A. K. Russ, who was a miner and witness, was asked: "Did you at any time have a conversation with Mr. Wadleigh relative to his buying the claim, as to whether he bought it on representations; or on his own judgment?" He answered: "Yes, sir"; and when further asked, "State where it was," answered: "We were coming on the stage to Waldo. He wanted me to help harvest his crop, and he told me he had bought the mine. And I said to him, if you had talked to Mr. Wimer's friends perhaps you wouldn't have bought it. He told me, 'I bought the mine on my own judgment; I paid my own money for it, and asked nobody's advice.'" Thomas Jackson, another witness, testified that he told him, "I have thoroughly prospected this property until I am thoroughly satisfied; I know it is good property"; and that he heard him say in another conversation that he wouldn't have invested that amount of money in any property unless he knew what he was doing; that he had thoroughly prospected this before he had bought it; that he did not go into this with his eyes shut or blind. If he bought the property on his own judgment, after he had thoroughly examined it, aided by an experienced hydraulic miner, whom he had taken with him for that purpose, it must have been because the result of their investigation satisfied him as to the true condition of the mine and its value. He "asked nobody's advice"—he did not listen to anybody's warning. When Simmons told him that he sunk the Simmons shaft, and that the ground in the vicinity of it could not be bottomed and worked off by hydraulic process, he paid no attention to it; and when Watts confirmed this information by his survey, it excited no suspicion.

The time and occasion and the means of obtaining a true knowledge of the real status of the mine was there to be availed of. Wadleigh was there, backed by the experi-

Opinion of the court—LORD, J.

enced judgment of Bailey, to aid him in the investigation; and his subsequent conduct and declarations tend strongly to indicate that he and Bailey had availed themselves of these means and opportunities to fully satisfy themselves of the nature and value of the mine, and to cause him to make the purchase on his own judgment, and without relying upon the representations of any one. It seems to us, therefore, when all the facts and circumstances are considered, that there is in them an effect which tends to corroborate the testimony of George Wimer, and render it intrinsically probable. Possibly, the fact may be otherwise;—we can only judge from the record;—but taking it for our guide, the circumstances surrounding the case, viewed in the light of Wadleigh's conduct and declarations, do not seem to furnish the occasion or necessity for George Wimer making any false representations; or if any were made by him, that they were relied upon as an inducement for the purchase.

Even where misrepresentations are made, if a person relies upon his own judgment, when he has full means of knowledge, he cannot complain of such misrepresentation.

On a charge of fraud, the burden of proof is on the party alleging it. The defendants must clearly and distinctly prove the fraud or false representations they allege. The law in no case presumes fraud. The presumption is always in favor of innocence, and not guilt. Fraud must be proved, but it may be proved by circumstances from which no other inference but that of fraud can be drawn. The rule is, that when proven by circumstances, they must afford a strong presumption. (*Juzan v. Toulmin*, 9 Ala. 662; S. C. 44 Am. Dec. 448.) Circumstances of mere suspicion will not warrant the conclusion of fraud. (*Taylor v. Fled*, 4 Barb. 92; *Clarke v. White*, 12 Pet. *178.) "The evidence of it," Chancellor KENT said, "must be clear, strong, and satisfactory." (*Boyd v. McLean*, 1 Johns. Ch. *582; *Gillespie v. Moon*, 2 Johns. Ch. 585; 7 Am. Dec. 559.) And so likewise said

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the learned and eminent DILLON, J., in *Geib v. Ins. Co.* 1 Dill. C. C. 443. In no doubtful matter does the court lean to the conclusion of fraud; it is not to be assumed on doubtful evidence. If the fraud is not clearly and strictly proved as alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings. (*Mowatt v. Blake*, 31 L. T. 387.) The facts constituting fraud must be clearly and conclusively established to justify the court in finding it; but it may be proved by the preponderance of the testimony. (Big. Fraud. 474, 476; Kerr, Fraud & Mis. 384; Bump, Fraud Conv. 584, 587; Wait, Fraud. Conv. § 281.)

In view of this strictness of proof required in cases of fraud, and that it must be established by a preponderance of evidence, it would be difficult for a court, upon the testimony as disclosed by this record, to discover such an amount of proof as would justify it in finding the necessary facts,—the alleged false representations and reliance upon them.

It is true, that George Wimer's character for truth and veracity was impeached by many witnesses; and standing alone, it might be entitled to little, if any, credit; but there are other circumstances in the case, and inferences to be drawn from them, that tend to corroborate his testimony and give probability to his statements. On the other hand, Wadleigh's unexplained failure to produce the evidence of Bailey, so vital to his defense under the circumstances, raises an unfavorable inference against him, and tends to break the force of his impeachment of Wimer. According to Wadleigh's testimony, the alleged false representations were made by Wimer in answer to his inquiries about the mine; but his conduct before the sale, and his conduct and declarations after it, viewed in the light of the surrounding circumstances, tend to show a state of mind neither seeking nor receiving information from Wimer or others about the mine. In a word, within the purview of his conduct and

Opinion of the court:—LOVE, J.

declarations, Wadleigh, aided by the experienced Bailey, was prospecting and examining the mine upon his own responsibility; and when the result of that investigation satisfied them of its nature and value, he bought it upon his own judgment. Hence, there was no occasion or necessity for Wimer to make any false representations; or if any were made by him, Wadleigh could not, consistently with his own testimony, have relied upon them as an inducement for the purchase. The record also discloses that he was in the possession of the mine, working it and taking gold out of it, about two years, without making any complaint or objection. During that time he wrote numerous letters to the plaintiffs, in which he highly praised the mining property and its prospects; assured them of his expectations to pay for it out of other property he expected to sell, described the work he was doing, and various other things, difficult to reconcile with any deceit or false representations that induced him to purchase it. It was not until Wadleigh was notified that the plaintiffs could wait no longer for the payment of the notes, that he made any complaint. When he was notified that the notes must be paid or that they would be compelled to foreclose the mortgage, he claimed that the purchase had been induced by false representations, upon which he relied, by reason whereof they had been enabled to perpetrate a fraud. While Wadleigh denies that the threatened enforcement of payment had anything to do with his conduct in this regard, in view of the facts, we think the circumstance deserves to be noted.

It results that we do not think the evidence sufficient to warrant or justify us in finding the defense to the enforcement of the mortgage proved.

The decree must be affirmed.

Opinion of the court—BRAN, J.

H. J. TEEL v. PEARL E. WINSTON ET AL.

ESTATE—FORECLOSURE OF MORTGAGE—DECEASED MORTGAGOR.—The death of a mortgagor and proceedings in the county court concerning the settlement of his estate do not prevent or suspend foreclosure of the mortgage. The only consequence of a failure to present the claim to the executor or administrator before bringing suit is, that a personal judgment cannot be rendered for a balance of the debt remaining unpaid after the security is exhausted. *Verdler v. Bygns*, 16 Or. 208, followed and approved.

Jackson county: L. R. WEBSTER, Judge.

Defendants appeal. Affirmed.

H. K. Hanna, and *J. W. Hamilton*, for Appellants.

A. S. Hammond, for Respondent.

BRAN, J.—This is a suit to foreclose a mortgage and for the sale of the mortgaged premises. The complaint avers in substance, that on October 24, 1890, U. L. Rice executed to John J. Strait his promissory note for two thousand one hundred and fifty dollars, due three years after date, with interest at ten per cent per annum, payable semi-annually, and if not so paid, the whole sum, both principal and interest, to become due and payable immediately at the option of the holder of the note. The note also provided for a reasonable attorney fee, in case of suit or action to collect the same. On the next day, Rice executed to Strait a mortgage on certain real estate to secure the payment of this note. The mortgage contained the same provisions in regard to attorney fee and payment of interest as the note, and also contained the following provision: "It is also expressly understood, that if any sum made payable by the terms of said promissory note, or becoming due hereunder, shall remain unpaid for the period of ten days after same shall have become due and payable, then the party of the second part, his executors, administrators, and assigns, may, at his or their option, declare the whole amount of said promissory note, with interest to date and attorney fee, to be at once due and payable, and may at once foreclose his

32	489
34	43
34	430

Opinion of the court—BEAN, J.

mortgage and sell the premises as herein provided." The note and mortgage were, on the same day, for a valuable consideration, assigned to plaintiff, and both the mortgage and the assignment were duly recorded in the proper office. On July 17, 1891, Rice died, leaving a will bequeathing all his property to Pearl Winston, and appointing defendant Brockway his executor. Brockway duly qualified as such executor, and letters testamentary were issued to him on April 10, 1891, and he has ever since continued to act as such. On April 15, 1891, plaintiff duly verified and filed his claim under said note and mortgage with the executor, and the same was duly allowed. On April 24, 1891, there became due upon said promissory note the sum of one hundred and seven dollars and fifty cents, as interest, according to the terms thereof, but nothing was or has been paid thereon. On May 6, 1891, more than ten days thereafter, plaintiff notified Brockway, as executor, that he declared and elected the whole sum of principal and interest to be due and payable. Thereafter, on May 16, 1891, this suit was commenced to foreclose the mortgage and for a decree for the sale of the mortgaged premises. A demurrer to the complaint having been overruled by the court below, defendants refused to plead or answer further, and a decree was entered in plaintiff's favor, from which defendants bring this appeal.

The contention of defendants on this appeal may be summarized as, first, the suit is prematurely brought, because six months had not expired from the granting of letters testamentary to Brockway; second, no claim for the accrued interest was ever presented to the executor for allowance or payment; and, third, it does not appear that the mortgage claim, or any part thereof, was ever disallowed by the executor.

In *Verdier v. Bigné*, 16 Or. 208, it was held by this court that the death of the mortgagor and the proceedings to administer his estate in the probate court, did not affect

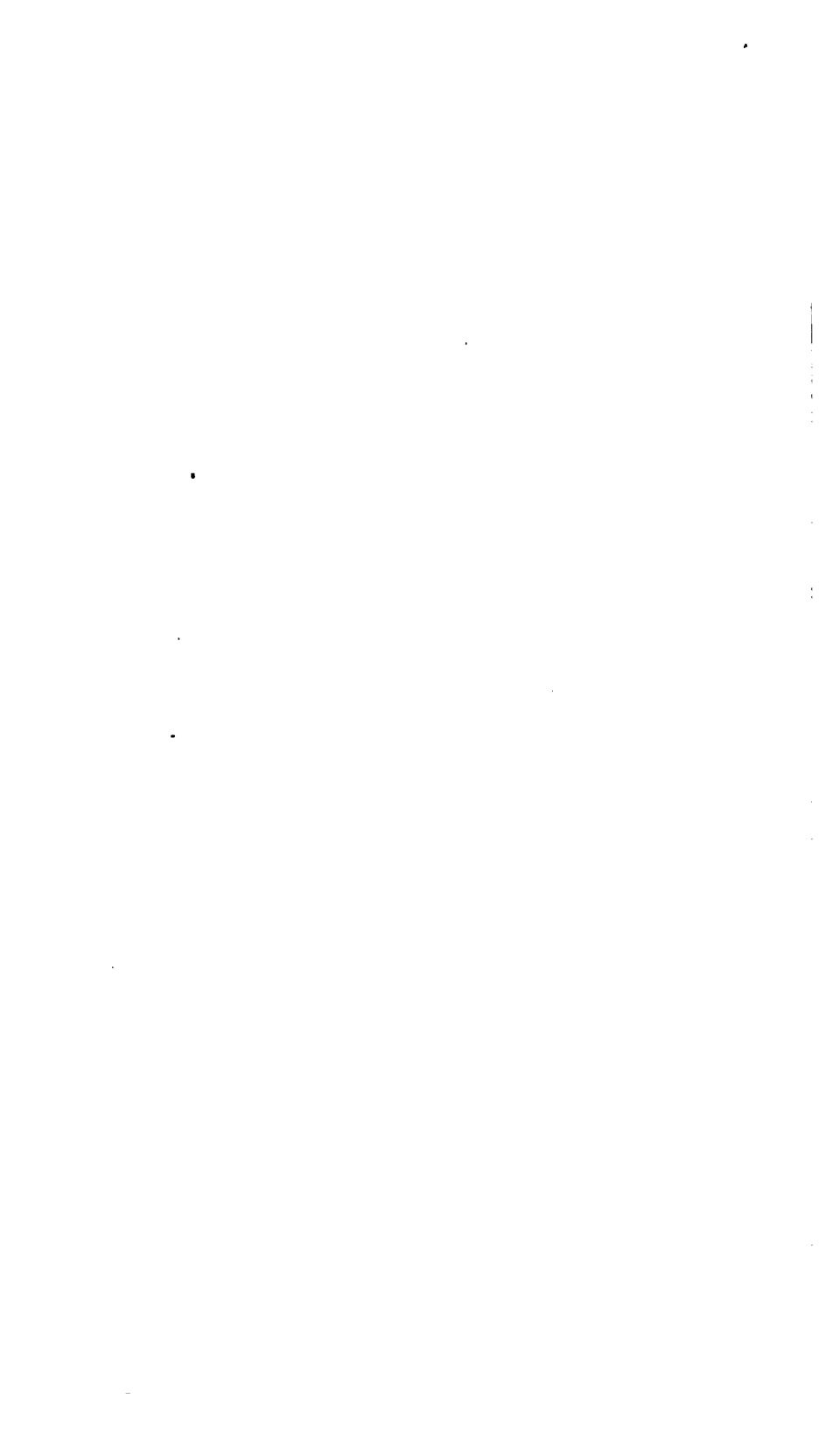
Opinion of the court—BEAN, J.

the lien of the mortgage or the right to foreclose such lien in the circuit court. The logical effect of this decision is, that the death of the mortgagor and the proceedings in the probate court do not change or suspend the remedy of the mortgagee to enforce his lien on the mortgaged lands, and as a consequence no presentation of the claim for allowance to the administrator or executor is necessary before bringing suit, nor does section 377, Hill's Code, have any application to proceedings of this kind. This doctrine seems to be amply supported, and the general rule is, that the failure to present to an executor or administrator for allowance a claim secured by mortgage, only operates to prevent a judgment for any deficiency that might remain after exhausting the mortgaged property, but does not affect the right to a foreclosure where no recovery is sought beyond the proceeds of the mortgaged lands. (Wörner Law Admr. § 409; *Allen v. Moer*, 16 Iowa, 307; *Hill v. Townley*, 45 Minn. 167; *Scamman v. Ward*, 1 Wash. St. 179; *Reed v. Miller*, 1 Wash. St. 426; 5 Am. & Eng. Enc. Law. 213.)

In this case plaintiff is only seeking to enforce his lien against the mortgaged premises, and therefore there was no error in overruling the demurrer by the court below, and the decree is affirmed.



MAY TERM, 1892.



CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

OREGON.

MAY TERM, 1892.

[Filed May 6, 1892.]

GEORGE RADER v. EMMET BARR.

APPEALS—JUDGMENT BY CONSENT.—No appeal lies from a judgment given by consent of parties.

Grant county: JAMES A. FEE, Judge.

Plaintiff appeals. Reversed.

This action was commenced in justice's court for Long Creek precinct, Grant county, Oregon. After the service of summons, the defendant appeared in said justice's court and filed his answer denying each material allegation of the complaint. Thereafter, both the plaintiff and the defendant appeared in said justice's court, and the defendant consented that judgment be rendered against him for the amount demanded by the complaint, which judgment was accordingly entered. Thereafter, the defendant served notice of appeal to the circuit court, gave an undertaking on appeal, and filed a transcript in the circuit court. At the next term of the circuit court, the appellant herein

22	497
26	164
30*	311
37*	542
22	495
28	23
28	27
22	497
33	163
22	495
45	411

Opinion of the court—STRAHAN, C. J.

filed a motion to dismiss said appeal, on the ground that no appeal would lie from a judgment given by consent, and because the undertaking was filed with the justice seven days before the notice of appeal was filed, which motion was overruled by the court. Thereafter, on a trial before a jury, the defendant had a verdict, upon which a judgment was duly entered for costs, from which the plaintiff has appealed.

Bailey & Balleray, for Appellant.

No appearance for Respondent.

STRAHAN, C. J.—A single question was presented in this court, and that was, the action of the trial court in refusing to dismiss the appeal from the justice. By consenting to the rendition of a judgment in favor of the plaintiff by the justice for the amount claimed, the defendant, in effect, waived his answer and left no issue in the case to be tried, and from such a judgment no appeal lies. (*La Societe v. Beardslee*, 63 Cal. 160; *Conniff v. Kahn*, 54 Cal. 283.) The reason of this rule is plain. Courts are held to try real controversies between parties; but consent ends all contention, and leaves nothing for the court to do but to see that the same is carried into effect. The circuit court, therefore, erred in refusing to dismiss the appeal, for which its judgment must be reversed, and the cause remanded to the court below with directions to sustain the motion.

Opinion of the court—BEAN, J.

[Filed June 21, 1892.]

A. E. EATON v. O. R. & N. CO.

APPEALS—BILLS OF EXCEPTIONS.—In formulating a bill of exceptions, it is necessary that the point of each exception be particularly stated; but it is contrary to the statute to state more of the evidence or other matter than is necessary to explain each exception.

Union county. JAS. A. FEE, Judge.

Defendant appeals. Affirmed.

W. W. Cotton, for Appellant.*R. Eakin*, for Respondent.

BEAN, J.—This is an action to recover from the defendant seven hundred and ten dollars for certain stock alleged to have been killed by its trains, and for damages caused by fires alleged to have originated from sparks escaping from its engines. The complaint contains six separate causes of action, three of which are for stock killed, and the remaining three for damages done by fire. At the close of the plaintiff's testimony, the defendant moved for a nonsuit as to all the causes of action; and its motion was granted as to the sixth cause of action, and denied as to each of the others. The jury found a verdict in favor of plaintiff for six hundred and ninety-three dollars and fifty cents, upon which judgment was entered, and the defendant appeals.

As appears from the brief of counsel for appellant, the errors relied on here, are, in overruling a motion for nonsuit; in the admission of a certain letter in evidence, and the giving of a certain instruction to the jury. These assignments of error are claimed to be presented by what counsel terms a bill of exceptions, but which is nothing more or less than the whole testimony and proceedings of the trial as it took place extended from the stenographer's notes. The testimony alone covers more than one hundred pages of type-written matter, the large proportion of which

22	497
23	98
30*	311
31*	284
22	497
40	804

Opinion of the court—BRAN, J.

has no relevancy or applicability to the question sought to be presented for our consideration. Scattered through this mass of testimony, are the objections of counsel, the rulings of the court, and the exceptions taken thereto. The whole proceedings of the trial have been certified here as a bill of exceptions, and we are expected to labor through this voluminous record, segregate and classify it, and out of it to construct a bill of exceptions, and then determine whether the assignments of error are well taken. This practice is in utter disregard of the plain provision of the civil code, which requires that the exception should be stated with so much of the evidence or other matter as may be necessary to explain it, and no more (section 232); and has repeatedly received the disapproval of this court. In *State v. Murray*, 11 Or. 414, Mr. Justice THAYER, speaking for the court, says: "Such a practice is not only unlawyer-like, but it is an imposition upon the court. * * * It presents an unwieldy document, imposes a difficult labor upon this court, to search out and ascertain the points assigned as error, and creates an unnecessary expense. It is a shameful procedure, and the judges of the circuit courts should interfere and put a stop to such kind of practice." Again, in *Tucker v. S. F. M. Co.* 15 Or. 584; the same judge, in discussing a question sought to be raised by a bill of exceptions like the one in this case, said: "Whether the evidence sent up here in what counsel are pleased to term a bill of exceptions, will warrant such a conclusion or not, I shall never know; for I never intend to look into it to ascertain whether such is the fact or not. If counsel desire a review of such questions, they must prepare a bill of exceptions as provided in the civil code of the state. They have no right to throw together in a mass all the testimony given in the case as taken down and extended by a shorthand reporter, as has been done in this case, and bring it here and require this court to examine it, and find its conclusions of fact therefrom. No such practice should be toler-

ated by an appellate tribunal in a proceeding to review errors of law. * * * Many questions of law may involve an examination of the testimony given in a case, such as the overruling of a motion for a nonsuit; but ordinarily an exception requires a statement of a small portion of the evidence in order to explain it. But the fault here referred to, is not that the objection constituting the exception is stated with more of the evidence than is necessary to explain it—the fact is, it is not stated at all. The proceedings had at the trial, and the evidence taken, are marshalled and sent here for this court to examine and consider the various exceptions indicated therein.” Further on he says: “The statute clearly intends that a statement of the exception shall be made up, settled, allowed, and signed by the judge, and filed with the clerk, and thereafter it is deemed and taken as part of the record of the cause. (Code, § 230.) No such labor-saving shift as that which seems to have been devised and adopted in this case can be countenanced. It would lead to so loose a practice that counsel could not know nor courts determine what questions were involved or were to be decided.”

In *Janeway v. Holston*, 19 Or. 98, STRAHAN, J., in speaking of a similar bill of exceptions, says: “The reporter’s notes contain ample material from which a bill of exceptions might have been constructed; but the wildest liberty in the use of language cannot torture this writing into one. Section 230, Hill’s Code, defines an exception, and section 231 points out the method of making the same a part of the record, so as to present a question for review in this court; and we have several times endeavored to point out the necessity of observing these provisions of the code in the preparation of a case on appeal. If these provisions of law be utterly disregarded, there is nothing presented which we can properly examine.” And in *Fiore v. Ladd*, ante, 202, the court, in speaking of the practice of making a part of the bill of exceptions all the evidence given on the trial

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when no questions are presented for review calling for an examination of the evidence, said: "This practice is in disregard of the plain provisions of the statute (Hill's Code, § 232), as well as all rules governing the preparation of bills of exceptions, is unnecessarily expensive to litigants, and imposes the arduous task upon this court of examining a vast amount of irrelevant and immaterial matter."

The provisions of our statute introduce no new rule in this matter, but are merely declaratory of the law as it already existed. In *Pennock v. Dialogue*, 2 Pet. 15, Mr. Justice STORY condemns the irregularity, inconvenience, and expense of putting the entire evidence of a case into the bill of exceptions, and expressed the regret of the court that such a practice should prevail. In *Zeller v. Eckert*, 4 How. 297, Mr. Justice NELSON said: "This mode of making up the error books is exceedingly inconvenient and embarrassing to the court, and is a departure from familiar and established practice. Only so much of the evidence given on the trial as may be necessary to present the legal questions thus raised and noted, should be carried into the bill of exceptions. All beyond, serves only to encumber and confuse the record and to perplex and embarrass both court and counsel." In *Johnston v. Jones*, 1 Black, 220, Mr. Justice SWAYNE, in speaking of this practice, said: "The court desires to put on record again its condemnation of this irregularity, and to express the hope that a better practice may prevail hereafter in all cases intended to be brought before this court for revision." Again, in *Lincoln v. Clafin*, 7 Wall. 136, Mr. Justice FIELD, in delivering the opinion of the court, uses this language: "A bill of exceptions should only present the rulings of the court upon some matter of law, as upon the admission or exclusion of evidence, and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearings of the rulings upon the issues involved. If the facts upon which the rulings were made

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are admitted, the bill should state them briefly, as the result of the testimony; if the facts are disputed, it will be sufficient if the bill allege that testimony was produced tending to prove. If a defect in the proofs is the ground of the exception, such defect should be mentioned without a detail of the testimony. Indeed, it can seldom be necessary for the just determination of any question raised at the trial to set forth the entire evidence given; and the practice in some districts—quite common of late—of sending up to this court bills made up in this way,—filled with superfluous and irrelevant matter,—must be condemned.”

The object of a bill of exceptions is to bring into the record the particular matter excepted to, and which the record would otherwise not disclose. It should, therefore, be drawn up concisely, but as explicitly as possible, with a view to stating all the facts and circumstances necessary to the statement of the point of law intended to be raised. (*State v. Drake*, 11 Or. 396; *Powers*, App. Pro. 225; *Green*, *Pleading & Practice*, § 1140.) The object is to present the naked legal question; and only such facts as are necessary to explain its relevancy to the particular case should be stated. With such a record, it is only necessary for this court to consider and determine the question of law presented, and not be compelled to labor through a voluminous record to ascertain the facts upon which the question is based, and having done so, to be met with a petition for rehearing, as is not unfrequently the case, in which the legal conclusions are not controverted, but “respectfully but earnestly insisting that the court is mistaken as to the facts.” If counsel desire the entire proceedings of the trial to be made a part of the record, there perhaps can be no objection; but ordinarily it should be attached to and made a part of the bill of exceptions as an exhibit, or in some other appropriate way, and not massed together, entitled a bill of exceptions, and certified here for us to examine, and ascertain whether the trial court erred. Cases may and

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often do arise in which it is necessary for this court to examine the evidence upon the entire case, or upon some particular point. In such cases, the bill of exceptions must, of course, contain the evidence; but there should be embodied in it only the evidence bearing upon the particular point presented. We do not desire or intend to enforce any technical or refined rule in this matter; and when the question sought to be presented is clearly stated and readily understood, we shall examine and decide it, although the record may contain much irrelevant and immaterial matter. But where, as in this case, the questions of law depend entirely upon facts which are in dispute between counsel, we cannot be expected to examine the entire record of the trial, separate the material from the immaterial matter, and undertake to decide with whom the facts are. It was the duty of counsel, in the preparation of the bill of exceptions, to have segregated the evidence, and brought here only such as is applicable to the point raised, and then we could have determined the question intelligently. If the practice adopted in this case is to prevail, the statute becomes meaningless, and the office of a bill of exceptions entirely abrogated; and it is only necessary in all cases to embody in the record a copy of the stenographic report of the trial as and for a bill of exceptions. Such a labor-saving process cannot receive the approval of this court.

This case is an apt illustration of the vice of such a practice. In support of the motion for a nonsuit, it is contended that no evidence was introduced on the trial tending to prove ownership or operation by the defendant of the railroad mentioned in the complaint, or the engines or cars used thereon. In place of this point being stated, with only the facts or evidence bearing upon it, if any, and if not, a statement to that effect, the record contains, embodied in the bill of exceptions, the whole of the evidence as given at the trial upon all the issues, including not

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only the evidence upon the five causes of action submitted to the jury, but also upon the one to which the court sustained the motion for a nonsuit.

The objection urged to the instruction is that "it omitted any reference to the contributory negligence of the plaintiff, or his servants, as to the fire mentioned in the fifth cause of action, as clearly shown to exist by the evidence." Here, again, the facts, if any, tending to show contributory negligence, are not stated, nor is the evidence upon this question separated or segregated from the mass of testimony, but we are expected to hunt through the entire record of a long and protracted trial to see whether there is any such evidence. So also in relation to the letter of Mr. Smith, admitted in evidence, the objections are, (1) it does not relate to the fire mentioned in the complaint; (2) there is no evidence that Smith was an agent of the defendant; and (3) if he was an agent of the defendant, there is no evidence that he was authorized to make the admission said to be contained in the letter.

It will thus be observed that all the questions sought to be presented on this appeal depend largely upon questions of fact, or inferences to be drawn from certain portions of the testimony. The point of each exception should have been particularly stated, complete within itself, accompanied with so much of the evidence or other matter, necessary to explain it, and no more, and not all thrown together in one indiscriminate mass, as was done in this case. We conclude, therefore, that the bill of exceptions presents no question for our consideration, and the judgment must be affirmed.

We reach this conclusion with less reluctance, because no substantial injustice seems to have been done the defendant in the trial; and objection was taken in the court below to the form of the bill of exceptions, and a protest there made by plaintiff's counsel to its allowance by the trial judge in the form presented.

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[Filed June 21, 1892.]

B. F. WILSON ET AL. v. NICHOLAS TARTER.

MORTGAGES—FORECLOSURE—REDEMPTION OF PARCEL.—A mortgage was foreclosed and the whole mortgaged premises sold on execution to the mortgagee without making a defendant of one who owned part of the land by title acquired subject to the mortgage; *held*, in a suit by the successor in interest of such owner to redeem his parcel of land, that the mortgagee must elect between redemption of the whole premises on the one hand, or, on the other, conveyance of the parcel to the plaintiff, in the suit to redeem.

Union county: JAS. A. FEE, Judge.

Defendant appeals. Modified.

The object of this suit is to redeem certain mortgaged property. The facts upon which the plaintiff's rights depend may be briefly summarized: On the seventh day of January, 1885, one M. B. Baird and E. D. Baird, his wife, were the owners in fee of several lots, blocks, and parcels of land situated in the town of Union, Lewis' addition to the town of North Union, McCully's addition to the town of North Union, and also in the town of West Union, all in Union county, Oregon, and on that day mortgaged the same to Nicholas Tarter and W. H. McComas to secure the payment of two notes,—one to McComas for eight hundred and seventy-eight dollars and fifty-eight cents, and the other to the defendant Tarter for one thousand dollars,—each of said notes bearing interest, which mortgage was duly recorded; that thereafter the note to McComas was duly paid; that on the ninth day of June, 1885, said Baird and wife sold and conveyed in due form block one in McCully's addition to North Union, which was included in said mortgage, to one A. Riggs, which deed was duly recorded June 30, 1885; that thereafter, M. B. Baird died intestate, and Nelson Schoonover was duly appointed administrator of his estate; that on the eighth day of August, 1887, said Tarter commenced a suit in the circuit court of Union county, Oregon, to foreclose said mortgage; that in said

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suit, said administrator, as well as E. D. Baird and the heirs at law of M. B. Baird, were made parties defendant, but not A. Riggs; that on the twenty-fourth day of February, 1888, such proceedings were regularly had in said suit that a decree was regularly taken and entered foreclosing said mortgage against said defendants, and directing the mortgaged premises to be sold to satisfy the amount then due, namely, one thousand two hundred and sixteen dollars and sixty cents, with costs and disbursements. Thereafter, upon an execution duly issued on said decree, and the sheriff having advertised said property according to law, the same was duly sold as one parcel to the defendant Tarter on the ninth day of April, 1888, for the sum of one thousand four hundred and twenty-nine dollars and sixty-three cents; and at said time said purchaser received the proper certificate; that on October 4, 1888, said circuit court duly confirmed said sale, and that thereafter, the time of redemption having expired, the sheriff of said county made a deed conveying said property to Tarter, who entered into possession of all of said property; that on the seventh day of August, 1889, Riggs and wife, by deed in due form, conveyed to the plaintiff said block one in McCully's addition to the town of North Union, Union county, Oregon, including his equity of redemption of, in and to the whole of said mortgaged premises; that the reasonable value of the rents and profits of said mortgaged premises since Tarter entered into the possession of the same is thirty-five dollars per month; and plaintiffs offer to pay whatever may be found to be due on said mortgage to Tarter upon an accounting.

The answer admits many of the facts relied upon by the plaintiff, but the principal contention is as to the law arising thereon. It is admitted that the rents and profits of said mortgaged premises from the date of the sale till this suit was commenced were three hundred and seventeen dollars and fifty cents, and that Tarter paid seventy-eight

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dollars and fifty cents in making permanent repairs on the property, and taxes thereon to the amount of one hundred and three dollars and twenty-two cents.

The reply denies the new matter in the answer. The reply also contained some new matter by way of estoppel as to one of the contentions of the defendant, but the same need not be specially noticed.

The cause was referred, and after taking the evidence, the referee found the facts as follows: First, that on the seventh day of January, 1885, when M. B. Baird and wife made the said mortgage to the defendant, set out in the complaint, they were the owners of said block one in McCully's addition to the town of North Union, and that in said mortgage they attempted to and purported to convey to the defendant with certain other property, lots four, five, six, and seven, or one-half of said block one; second, that the recorded plat of said block one of McCully's addition does not show that said block is laid out in town lots, but that the deeds mentioned and referred to in said stipulation show that said block one contains eight lots; third, that the deed from M. B. Baird and wife to A. Riggs, dated June 19, 1885, conveyed to said Riggs all of said block one; fourth, that the defendant claimed in his complaint, filed for foreclosure of said mortgage, that said mortgage included said lots four, five, six, and seven of said block one, and that it was a valid and subsisting lien thereon; fifth, that defendant has at all times since the sheriff's sale of the mortgaged premises claimed to own said lots four, five, six, and seven of said block one, by virtue of said sheriff's sale and deed; sixth, that the deed from A. Riggs and wife to plaintiffs, dated August 7, 1889, conveyed to plaintiffs all of said block one, and that whatever equities of redemption said A. Riggs and wife had in and to the property included in defendant's mortgage, were conveyed to plaintiff thereby; seventh, that defendant has received from rent of said mortgaged property up to the ninth day

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of February, 1891, four hundred and ninety dollars and seventy cents, but that he has received no rent from said block one; eighth, that defendant has expended for repairs on said mortgaged property one hundred and thirty-one dollars and eighty-five cents, and has paid taxes on the same, including the taxes of 1890, assessed to defendant, ninety-eight dollars and eighty-eight cents; ninth, that the amount due defendant on said mortgage at the time of the sale, exclusive of attorney fees and costs, was one thousand three hundred and thirty-two dollars and sixty-six cents, and that nothing has been paid on it by the mortgagor, nor has any part of it been paid since by the heirs or administrator of the deceased mortgagor; tenth, that there is nothing to show from the pleadings or the stipulation the value of the different lots or parcels of land included in the mortgage, or of any or all of the property mortgaged; eleventh, that A. Riggs, plaintiffs' grantor, was not made a party to the foreclosure suit by defendant.

The referee also made findings of law favorable to the plaintiffs, and recommended a decree in their favor. The court modified the findings of fact as well as of law in one particular, and then decreed in favor of the plaintiffs, from which the defendant has brought this appeal.

R. Eakin, for Appellant.

Plaintiff would be required to redeem the whole property by paying the whole debt if the mortgagee demanded it; but his rights are only against us as mortgagee, not as purchaser. They can redeem our mortgage, not the land. (*Renord v. Brown*, 7 Neb. 455; *Green v. Dixon*, 9 Wis. 536.)

The court cannot compel conveyance by defendant to plaintiffs, of the property, when so redeemed; plaintiffs are only subrogated to the rights of the mortgagee. (*Robinson v. Fife*, 3 Ohio St. 564; *Jones Mortg.* § 1075.)

All the parties being in court, instead of permitting redemption by plaintiffs and requiring another suit by

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them to compel contribution from owner of the other parcels, the court will adjudicate the whole matter, and determine the amount to be paid by plaintiff, and also the *pro rata* due from defendant's portion of the land to supply the mortgage debt, and compel payment accordingly.

The right to require the redemption of the whole property by the owner of only a part, is personal to the mortgagee; he will not be required to divide his securities; but the redemptioner cannot demand such right. (Jones Mortg. § 1072; *Dukes v. Turner*, 44 Iowa, 575; Pom. Eq. Jur. § 1220.)

By defendant's purchase at foreclosure sale, he has become the grantee of the mortgagor of the property as to the property owned by the mortgagor at the time of foreclosure; and his rights as mortgagee stand intact as to the property owned by plaintiffs, their rights not having been foreclosed. (*Sellwood v. Gray*, 11 Or. 539; *Watson v. Dundee etc. Co.* 12 Or. 474.)

If plaintiffs are permitted to redeem against us, it only subrogates them to the rights of the mortgagee; and defendant, as grantee of the mortgagee, has right and privilege to contribute his *pro rata* of the debt, and thus save his share of the property.

In case of redemption from the purchaser at a foreclosure sale, who has been in possession from the date of sale, the purchaser is not chargeable with rents, or value of use, to be deducted from the mortgage debt or purchase price. (Hill's Code, §§ 301, 303, 307; *Curtwright v. Savage*, 5 Or. 397; *Higgenbottom v. Benson*, 24 Neb. 46; S. C. 8 Am. St. Rep. 211; *Page v. Rogers*, 31 Cal. 301; *Harris v. Reynolds*, 13 Cal. 516; 73 Am. Dec. 600.)

In this case the defendant foreclosed his mortgage, had the property sold, and received the sheriff's deed therefor, without making plaintiff's grantor, Riggs, a party. By virtue of these proceedings, the defendant is now the owner in fee of the property mortgaged, except the plaintiff's lots;

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or, in other words, he is the grantee of the mortgagor. (Jones Mortg. § 1075; *Abraham v. Chenoweth*, 9 Or. 354.)

T. H. Crawford, for Respondents.

The defendant Tarter cannot be heard to say that his mortgage lien did not attach to these lots described and set out in his said mortgage, for the reason, as the facts show, that in the foreclosure proceedings referred to in the complaint, said Tarter asked the court for decree adjudging his mortgage a valid and subsisting lien on said lots; and the court, in its decree therein rendered, adjudged said mortgage of said Tarter to be a valid and subsisting lien against all of the property described in said mortgage, including said lots, and the said Tarter is, by reason thereof, estopped from denying the lien of his mortgage as aforesaid. (Bigelow, Estoppel, 601-604; 7 Am. & Eng. Ency. Law, 22; *Embry v. Palmer*, 107 U. S. 8; *Dreyfous v. Adams*, 48 Cal. 131.)

When a necessary party to a foreclosure proceeding is not made a party to the suit, his equity of redemption remains unimpaired, and he can redeem by paying the mortgage debt and interest and all expenses incurred by the purchaser for the necessary and permanent improvements made upon the mortgaged premises, and taxes assessed against the same, less the rents, issues, and profits received by the purchaser or mortgagee in possession, and such redemption may be had, however small the interest of the party entitled to redeem. (15 Am. & Eng. Ency. Law, 828; 3 Pom. Eq. Jur. § 1220; Boone, Mortg. § 160; *Boquet v. Coburn*, 27 Barb. 230; *Street v. Beal*, 16 Iowa, 68; 85 Am. Dec. 504; *Dukes v. Turner*, 44 Iowa, 575; *Gibson v. Orehere*, 5 Pick. 146; *Calkins v. Munsel*, 2 Root, 333; *Martin v. Fridley*, 23 Minn. 14; *Andreas v. Hubbard*, 50 Conn. 351; *Gage v. Brewster*, 31 N. Y. 218; *Bradley v. Snyder*, 14 Ill. 263; 58 Am. Dec. 564; *Curtis v. Gooding*, 99 Ind. 45; *Kelgour v. Wood*, 64 Ill. 345; *Douglass v. Bishop*, 27 Iowa, 214.)

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A. Riggs, the grantor of respondents Wilson & Hackett, being at the time of the commencement of the foreclosure proceedings by appellant Tarter, seized of the legal title to block one of McCully's addition to North Union aforesaid, and not being made a party to said foreclosure proceedings, his right of redemption was not affected, and he had a right to redeem from the mortgage, notwithstanding said foreclosure and sale, and the deed from said A. Riggs and wife to these respondents vested the equities of said Riggs in them. (Boone, Mortg., § 160; *Noyes v. Hall*, 97 U. S. 34; *Endel v. Leibrick*, 33 Ohio St. 254.)

STRAHAN, C. J.—It must be taken as the settled law of this court that if the mortgagor, the owner of the mortgaged premises, or a subsequent lien-holder, is not made a party to a foreclosure suit, his interest is unaffected by the suit, and the decree of foreclosure does not bind his rights. (*Besser v. Hawthorne*, 3 Or. 512; *DeLashmutt v. Sellwood*, 10 Or. 319; *Wiltsie Forecl.* 126.) This principle is elementary, and was not controverted on the argument by appellant's counsel. The real contention grows out of its application. The respondent's contention is, that inasmuch as the several lots and parcels of land mortgaged were sold at the foreclosure sale at an aggregate sum and not separately, it is now impossible to determine what proportion of the burden created by the mortgage each should bear, and that therefore they have the right to redeem the entire property; and that by virtue of said redemption they are entitled to have all the mortgaged property transferred to them by the defendant. On the other hand, the appellant's contention is, that in exercising the right of redemption, the plaintiffs simply pay off the mortgage, by which means they become subrogated to Tarter's interest therein, with the right to hold and foreclose the same against the mortgaged property except the Riggs interest now held by the plaintiffs. It is proper to observe that the proceedings

in Tarter's foreclosure suit against Baird's heirs and representative are in every respect regular and sufficient in law to pass to him the Baird title in the entire property except the block deeded by Baird to Riggs. As to Baird's interest, then, Tarter's title is complete, and the only defect in the title as to the Riggs interest is that the mortgage was not foreclosed because the owner of the block was not made a party to the suit. Do these facts create in the owners of that interest such a controlling equity as to enable them to wrest from the defendant against his will the title to the property, as to which there is no question?

The right claimed on the part of the plaintiffs is placed upon the ground that the right of redemption as to the block they hold has not been foreclosed, and that they cannot exercise the right of redemption as to part without redeeming all; but this rule seems to have been made for the benefit of the mortgagee. The authorities say he shall not be compelled to divide his debt and security into portions: (*Green v. Dixon*, 9 Wis. 532.) But even this rule, it is said by the same authority, does not apply after a foreclosure and sale in a suit when the owner of one of the tracts mortgaged was not made a party. The same reason is suggested by another authority: "The debt being a unit, no party interested in the whole premises or in any portion of them, can compel the mortgagee to accept a part of the debt and relieve the property *pro tanto* from the lien." (3 Pom. Eq. Jur. § 1220.) In *Robinson v. Fife*, 3 Ohio St. 551, the principle is thus stated: "The right to claim that the whole, and not a part, shall be redeemed, is a right which appertains to the mortgagees, and not to the mortgagor. The reason of the rule is, that the mortgagee shall not be compelled to divide or apportion his security." (*Boquet v. Coburn*, 27 Barb. 230.) "But this rule does not apply," it is said, "where the mortgage has been foreclosed without making all of the several owners of the land parties to the suit, and the mortgagee has purchased at the

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sale, because he has by such proceeding and purchase voluntarily severed his right, and obtained an indefeasible title to part of the land, and only a defeasible title to another part. The owner not made a party, may redeem the portion owned by him on paying a part of the mortgage debt bearing such proportion to the whole as the value of his land bears to that part of the whole mortgaged premises." (2 Jones, Mort. § 1074.)

It was insisted by the respondents that in exercising the right of redemption they were entitled to a decree vesting in them all the estate of Tarter in the mortgaged premises, if he failed to convey the same upon receiving the entire amount of his mortgage and interest; and they cited several authorities to sustain their contention. (*Calkins v. Mensel*, 2 Root, 333; *Noyes v. Hall*, 97 U. S. 34.) But the authorities are not uniform on this subject. The appellants' contention is, that in redeeming, the respondents would acquire the security which the appellant held, and nothing else; that by paying his debt due by Baird, they simply became subrogated to his rights under the mortgage, and they cite *Renard v. Brown*, 7 Neb. 449; *Pardoe v. Van Anken*, 3 Barb. 534.

But without undertaking to reconcile these cases, or to adopt one theory to the exclusion of the other, it seems to us that complete equity may be administered in this case by applying *Boquet v. Coburn*, *supra*, to the facts of this case. According to the doctrine of that case, Tarter would have an election to say whether the entire premises should be redeemed or not. He may submit to a redemption by accepting the amount found due by the court, in which event he will convey his interest in the premises to the plaintiffs within thirty days after this decree is entered in the court below, or in default, the decree to operate to convey the same; or should he elect to retain the property, except the Riggs interest, now owned by the plaintiffs, he will, by good and sufficient deed, convey that to the plain-

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tiffs within twenty days after the entry of this decree in the court below covenanting against his own acts; and, in default of his executing said last-named deed within said time, then the defendant shall be deemed to have elected to accept his debt and transfer his interest as above provided.

Under the circumstances of this case, neither party will recover costs against the other in this court.

[Filed June 21, 1892.]

W. J. HAMM v. P. BASCHE ET AL.

JOINT ACTION—SEVERAL JUDGMENT.—Where a plaintiff proceeds against several defendants jointly, he may dismiss the action as to some of them, and prosecute it to final judgment against the others, in any case where a separate action might have been maintained.

Baker county: M. D. CLIFFORD, Judge.

Plaintiff appeals. Reversed.

This is an action commenced by the plaintiff against the defendants to recover for work, labor, and services, alleged to have been performed by plaintiff and his assignors for the defendants in the construction of what is known as the "Seven Devils wagon road," amounting to eight hundred and four dollars and eighty-seven cents and interest. The plaintiff, by his complaint, which is made up of seven distinct causes of action, alleges an indebtedness to him from the defendants on account of certain work, labor, and services, performed by himself and assignors, in the sum of eight hundred and four dollars and eighty-seven cents and interest.

The defendants by their several separate answers deny specifically all the allegations of plaintiff's complaint, except those which allege the assignment to plaintiff of the several claims set up in his complaint, and specifically deny that the plaintiff ever performed any services for the defend-

22	513
130	443
22	513
131	312
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43	79

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ants, or either them, and they deny that either of the plaintiff's assignors ever performed any services for them, or either of them; and they deny that they, or either of them, promised to pay, etc.

By way of separate defense, they allege that it was agreed and understood, both with the plaintiff and his assignors, that the defendants were not to be responsible for any sum of money whatever in payment for said services; that said work, labor, and services were so performed by the plaintiff and his assignors under said agreement and understanding; and that said work, labor, and services were not done at the request of the defendants, or either of them, and were in no manner for their benefit. The reply puts in issue the new matter contained in the separate answers of the defendants P. Basche, C. W. James, C. H. Duncan, and R. D. Carter.

The plaintiff then dismissed his action as to the defendants G. B. Moulton and R. D. Carter, whereupon the remaining defendants obtained leave of court to file a supplemental answer in which it is alleged that the plaintiff, after the filing of the defendants' answer, and after plaintiff filed his reply thereto, and before the cause was called for trial, and before the trial was commenced, did dismiss said action, and refuse to further proceed therein as to the defendants Moulton and Carter, and prayed that the action be also dismissed as to the other defendants. The plaintiff moved to strike out said supplemental answer, for the reason the same was frivolous and irrelevant; which motion the court refused. He then demurred to the same for the reason the facts stated therein did not constitute a defense to plaintiff's complaint, which demurrer was also overruled. The plaintiff declining to plead further, on motion of the defendants, the court dismissed the action, and rendered judgment in favor of the plaintiff for costs, from which judgment he has brought this appeal.

Argument of counsel.

Williams & Smith, for Appellant.

A supplemental answer, under section 107, Hill's Code, is not a waiver of all former pleas not inconsistent with it. (*Hamlin v. Kinney*, 2 Or. 91; *Medbury v. Swan*, 46 N. Y. 200.)

A supplemental complaint is not a substitute for the original complaint by which such former pleading is superseded; but it is a further complaint, and assumes that the original complaint is to stand. The same rule applies to supplemental answers. (*Dann v. Baker*, 12 How. Pr. 521; 2 Wait A. & D. 472.)

Unless the court compels the party applying for leave to file a supplemental pleading to elect to substitute it in the place of the previous one, both pleadings will remain. (*Brown v. Richardson*, 4 Rob. 603; *Slauson v. Englehart*, 34 Barb. 198.)

A supplemental pleading is governed by all the rules applicable to an original pleading. If it is insufficient as a pleading, it is subject to demurrer. (*Goddard v. Benson*, 15 Abb. 191.)

Under sections 60, 244, and 245, Hill's Code, a several judgment is allowable, irrespective of the character of the complaint, whether it alleges a joint or several liability. (*Sears v. McGrew*, 10 Or. 50; *Harrington v. Higham*, 15 Barb. 528; *Van Ness v. Corkins*, 12 Wis. 186.)

The common law rule, that the plaintiff is bound to establish a cause of action against all who are sued jointly, has been changed in Oregon. The rule here is to allow a judgment to be taken against the party or parties shown to be liable, when others are not liable. (*Ah Lep v. Gong Choy*, 13 Or. 214; *Fisk v. Henarie*, 14 Or. 33.)

Where two or more are sued on a joint contract, judgment may be entered against one only, if the proof be that one only is liable. (*Lewis v. Clarkin*, 18 Cal. 400; *People v. Frisbie*, 18 Cal. 402; *Tay v. Hawley*, 39 Cal. 95; *Soddard v. Van Dyke*, 12 Cal. 438; *Mulliken v. Hull*, 5 Cal. 246.)

Argument of counsel.

When one or more of the individuals sued jointly is not liable, the plaintiff may dismiss his action against those who are not liable and take judgment against those who are shown to be liable. (*Silvers v. Foster*, 9 Kan. 57; *Alvey v. Wilson*, 9 Kan. 404; *Whittenhall v. Korber*, 12 Kan. 620; *Stevens v. Thompson*, 5 Kan. 308.)

The action not having been brought to trial, and none of the defendants having filed a counter-claim, the plaintiff had a right, under subdivision 1, section 246, Hill's Code, to dismiss the action as to all or any of the defendants. (*Dimick v. Deringer*, 32 Cal. 490; *Reed v. Calderwood*, 22 Cal. 464.)

The plaintiff may enter a *nolle prosequi* as to any or all of the defendants, in an action upon contract, at any time before final judgment. (*Governor v. Welch*, 3 Ired. 249; *Norman v. Hope*, 2 Miles, 142.)

In an action against several on a joint contract, the plaintiff may confess the matter pleaded separately by one in bar as to him, and enter a *nolle prosequi* as to him, and proceed to judgment against the others. (*Link v. Allen*, 1 Heisk. 318; *Hallett v. Allaire*, Minor (Ala.), 360.)

The dismissal as to Moulton and Carter did not operate as a *retraxit* as to them, nor was a judgment in their favor a bar to further proceedings against them on the causes of action set up in the complaint. (*James v. Leport*, 19 Nev. 174.)

The remaining defendants had no concern with the non-suit granted to the defendants Moulton and Carter. (*Ahern v. McGeary*, 79 Cal. 44.) A discontinuance of an action as to one of several defendants does not operate to discontinue it as to the others. (*Montgomery G. L. Co. v. Montgomery & E. Ry. Co.* 86 Ala. 372; *Stoddard v. Van Dyke*, 12 Cal. 438; *Acquital v. Crowell*, 1 Cal. 191.)

The court may, at any time before the cause is submitted, allow a pleading or proceeding to be amended by striking out the name of any party, or by correcting a mistake in

the name of a party, etc. (Hill's Code, § 101; *Tormey v. Pierce*, 49 Cal. 306.)

The exercise of the power to allow amendments is within the sound discretion of the court. (*Hexter v. Schneider*, 14 Or. 185.)

The right of amendment is unlimited under such restrictions as to costs as the court may prescribe. (1 Am. & Eng. Ency. Law, 547; *Roland v. Kreyenhagen*, 18 Cal. 455.)

The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party. (Hill's Code, § 106; *Henderson v. Morris*, 5 Or. 28.)

The above rule is most beneficial, and the courts believe in construing it liberally. (*Began v. O'Reilly*, 32 Cal. 11.)

Hyde & Johns, F. L. Moore, and J. L. Rand, for Respondents.

Where two or more are sued jointly, *ex contractu*, the recovery must be against all or none of the defendants. (*Brown v. Little*, 27 Ill. App. 389.)

A release of one joint debtor releases all, unless the instrument shows a contrary intention. (*Yates v. Donaldson*, 5 Md. 389; 61 Am. Dec. 282; *Wiggin v. Tudor*, 23 Pick. 434; *Goodnow v. Smith*, 18 Pick. 414; S. C. 29 Am. Dec. 600; *Pond v. Williams*, 1 Gray, 636; *Hale v. Spaulding*, 145 Mass. 482; 1 Am. St. Rep. 476.)

STRAHAN, C. J.—The ruling of the court below seems to have been based upon the theory that the plaintiff, having declared upon a joint liability against all of the defendants, and having voluntarily dismissed his action as to two of them, he was precluded from proceeding to judgment against the others. In this view the court erred. Section 244, Hill's Code, provides: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants"; and section 245 provides: "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them,

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whenever a several judgment is proper, leaving the action to proceed against the others." In *Sears v. McGrew*, 10 Or. 48, this court considered the effect of these sections; and in disposing of them the court, by LORD, J., said: "Now, under the sections above referred to, judgment may be entered against any one or more of several defendants, whenever a several action might have been brought, or a several judgment upon the facts of the case would be proper; and this is allowable irrespective of the character of the complaint, whether it allege a joint or several liability; the true criterion being whether a separate action might have been maintained; and if it could, a several and separate judgment is proper."

This question was again before this court in *Ah Lep v. Gong Choy*, 13 Or. 205. In passing upon that point, the court said: "The appellant's counsel seemed to be of the opinion that the judgment could not be upheld as to one of the defendants, in an action upon a joint contract, unless it could be as to both. That formerly was the law. If a plaintiff commenced an action against two or more defendants upon a joint obligation, he was compelled to establish a joint cause of action against all, except when some of the contracting parties were under a disability; but the code has changed the rule by allowing a judgment to be taken against the party or parties shown to be liable, when the others are not liable." Now, there is nothing in the supplemental answer to show that the two defendants who were dismissed from the action were jointly liable with the others. Their answers denied their liability, which cast upon the plaintiff the burden of establishing such liability by a preponderance of the evidence. By their dismissal, the plaintiff confessed he was unable to establish such liability, and that is as much as can properly be claimed for the fact of dismissal. The case of *Fisk v. Henarie*, 14 Or. 29, has no application to the facts of this case. Under a statute identical or in substance the same as ours, the courts

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of last resort in the states where the question has arisen, have decided in the same way that was held by this court. (*Sears v. McGrew*, and *Ah Lep v. Gong Choy*, *supra*; *Silvers v. Foster*, 9 Kan. 56; *Lewis v. Clarkin*, 18 Cal. 399; *Link v. Allen*, 1 Heisk. 318; *Norman v. Hope*, 2 Miles, 142; *James v. Leport*, 19 Nev. 174; *Brumskill v. James*, 11 N. Y. 294; *People v. Oram*, 8 How. Pr. 151; *Clafin v. Butterly*, 2 Abb. Pr. 416; *Van Ness v. Corkins*, 12 Wis. 186.)

We are, therefore, of the opinion that the court below erred in overruling the demurrer to the supplemental answer and in dismissing the action; and that the judgment must be reversed, and the cause remanded to that court for such further proceedings as may be proper not inconsistent with this opinion.

[Filed June 21, 1892.]

STAVER & WALKER v. J. S. LOCKE.

CONTRACTS—GUARANTOR—SURETY.—A guarantor, like a surety, is bound only by the strict letter or precise terms of the contract of his principal whose performance he has guaranteed.

Baker county: M. D. CLIFFORD, Judge.

Plaintiff appeals. Affirmed.

The plaintiff is a private corporation doing business at Portland, Oregon. Before the formation of said corporation, which has succeeded to the business of the firm of Staver & Walker, said firm appointed one W. F. Locke their agent at Huntington, Oregon, for the sale of farm machinery, wagons, etc., and at the same time and by the same writing entered into an agreement with him, whereby, among other things, said agent agreed not to sell machinery, wagons, etc., in any other territory than that named; to do all the business pertaining to canvassing, taking orders for and selling goods; also looking after and making collec-

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tions; defraying the cost of recording mortgages; examining records; assuming all local and incidental expenses, including taxes, if charged; to receive freight, and pay charges on all goods received; to keep them insured for the benefit of Staver & Walker at two-thirds invoice prices; to keep them housed from exposure and rain and in good order until settled for or delivered, to pay all damages or losses that may occur to any goods while in their charge, and in no case to take parts from machines or other goods to sell or furnish as repairs, etc. By the third specification of said agreement, said Locke agreed to make all notes for farm machinery, wagons, etc., not otherwise specially provided for, due within six months from date of sale, unless by written consent of Staver & Walker; and to make all notes for mowers, reapers, and binders on as short time as possible, but one-half to be payable not later than November first after date of sale, and one-half not later than one year from date of first note; all notes to bear interest from date at ten per cent. By the fourth, to settle for all goods sold either by cash or notes at the time of delivery; said agent to be held liable for any loss or damage caused by deviation from this stipulation. By the fifth stipulation, Locke agreed to draw all notes payable to Staver & Walker upon blanks furnished by them, making the notes payable at the nearest bank or express office, with collection charges and exchange on Portland. The sixth specification, it being the one out of which this controversy mainly arises, is as follows: "To guarantee the payment at maturity, or any time thereafter, when demanded, of all notes and renewals of notes, taken for goods sold under this contract, endorse said notes as soon as taken, waiving demand, protest and notice of non-payment. Failure to endorse by said agent shall not affect above guaranty of payment." At the end of said contract is the following:

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"GUARANTY.

"For value received, and in further consideration of one dollar, to him in hand paid by said Staver & Walker, the undersigned do hereby guarantee the faithful and full performance by the agent named in the foregoing of all the agreements and engagements therein entered into by the said agent. Witness his hand and seal this day and date within written.

"In presence of

"TINA LOCKE.

"T. T. WOOD."

"W. F. LOCKE. [SEAL.]

"J. S. LOCKE. [SEAL.]

The complaint then alleges, that said W. F. Locke, while acting as such agent under said contract, and in accordance with its provisions, sold a part of the farm machinery, wagons, etc., furnished by Staver & Walker under said contract, to one Wm. Cook, for which said Cook executed three separate promissory notes, which are set out, one for twenty-five dollars, and two for thirty-seven dollars and fifty cents each. Quite a number of other sales are also alleged, and the taking of sundry notes, amounting in the aggregate to the sum of three hundred and seventy-eight dollars and sixty-eight cents, and that each of said notes provides for a reasonable attorney fee, and various sums are alleged which are claimed to be reasonable. Presentment is alleged of each of said notes to the several makers, when the same became due, and that payment was demanded and refused. It is then alleged that the plaintiff used much diligence in trying to collect said notes both from the makers and from the said agent, W. F. Locke; that the defendant J. S. Locke, guarantor, has been frequently duly notified of the failure and refusal of the said agent, W. F. Locke, to pay said notes or any of them, and of his failure thereby to faithfully fulfill the said agreements and engagements of his agency contract. It is also alleged that about the date of said several notes, the said agent,

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W. F. Locke, in ratification of the covenants on his part in said agreement set out, and in part performance thereof, endorsed each, every and all of the above-described notes in the following words, to wit: "In consideration of the commission to be paid upon the within sale as per terms of contract, I hereby guarantee the payment of the within note, waiving demand, notice, and protest.

"WM. F. LOCKE.

"Huntington, Oregon."

It is also alleged that demand for payment of the said notes, and each of them, has frequently been made of the said J. S. Locke; that he, the said J. S. Locke, has at all times refused and still continues to refuse to pay the said notes or any of them, thereby refusing to perform the covenants of his guaranty contract; and that said W. F. Locke is wholly insolvent, and has no property out of which said sum can be collected or any part thereof; that in furnishing said goods, Stayer & Walker relied wholly upon the contract of guaranty of the defendant, J. S. Locke, and not upon that of any one else whatever. To this complaint, J. S. Locke filed a separate demurrer, on the grounds—first, that the plaintiff has not legal capacity to sue; second, that the complaint does not state facts sufficient to constitute a cause of action, and, third, that there is a defect of parties defendant. This demurrer was sustained; and the plaintiff declining to plead further, final judgment was rendered in favor of the defendant J. S. Locke, from which the plaintiff has appealed.

W. F. Butcher, for Appellant.

J. L. Rand, for Respondent.

STRAHAN, C. J.—The liability of J. S. Locke, the respondent, depends upon the terms of his guaranty. As will be seen from the statement, he guaranteed the faithful performance by the agent named in the foregoing contract of all agreements and engagements therein entered into by the

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said agent. The only breach of the agreement on the part of W. F. Locke, by which it is claimed J. S. Locke became liable, is that said W. F. Locke failed to pay said notes when they became due, or on demand. The obligation which W. F. Locke assumed in this particular is contained in the sixth specification of the contract, and is contained in the statement. The duties and obligations assumed by W. F. Locke, by the agreement, are enumerated with great particularity, and are contained in specifications numbered from one to seven, inclusive. The second specification recites that the said W. F. Locke agrees to do all the business, etc.; third, to make all notes, etc.; fourth, to settle for all goods, etc.; fifth, to draw all notes, etc.; sixth, to guarantee the payment, at maturity, or any time thereafter when demanded, of all notes and renewals of notes taken for goods sold under this contract; indorse said notes as soon as taken, waiving demand, protest, and notice of non-payment. If these words in themselves import a guaranty by W. F. Locke of the payment of all notes taken by him for goods sold, then there is much force in the appellant's contention; on the other hand, if they only bound W. F. Locke to indorse the notes in the manner therein specified, then there is no reason whatever to claim that the defendant is liable on his guaranty, for the reason the complaint alleges that W. F. Locke duly indorsed them.

The phraseology used is obscure, and its meaning is not obvious, and the inferences to be drawn from different parts of the agreement are so contradictory and unsatisfactory that we fail to derive any aid from that source. For instance, the fourth clause obliges the agent to settle for all goods sold, either by cash or notes, at the time of delivery; said agent to be held liable for any loss or damage caused by a deviation from this stipulation. It may be suggested that if he was liable at all events, or as guarantor for all goods sold, why does this clause only hold him liable for any loss or damage caused by a deviation from this stipulation?

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Besides, if he was liable as guarantor in every case when the purchaser did not pay, why indorse the notes at all? Staver & Walker, under that construction, held a single guaranty covering all defaults; and the indorsements of the notes added nothing to the liability of the agent. Then, on the other hand, it is declared in the latter part of clause six that failure to indorse by said agent shall not affect above guaranty of payments. This language seems to assume that, aside from the indorsements provided for, the contract contained a guaranty of payment. What W. F. Locke agreed to do was to guarantee the payment at maturity, etc.; and the subsequent language of clause six seems to indicate in what manner the guaranty was to be made, namely, by indorsing said notes as soon as taken, waiving demand, protest, notice of non-payment, etc.; all of which the pleadings admit he fully performed. The plaintiff's contention seems somewhat forced, and the construction contended for, strained and unnatural. The intention of the parties to a contract of guaranty, when ascertained, is to prevail as in other contracts; still, it is said that it is now too well settled to admit of doubt that a guarantor, like a surety, is bound only by the strict letter or precise terms of the contract of his principal, whose performance he has guaranteed; that he is in this respect a favorite of the law, and that a claim against him is *strictissimi juris*. (*Kingsbury v. Westfall*, 61 N. Y. 356.) And in determining the liability of a surety or a guarantor, it must be remembered that he is a favorite of the law, and has the right to stand upon the strict terms of his obligation, when such terms are ascertained. (*People v. Chalmers*, 60 N. Y. 154; *State v. Churchill*, 48 Ark. 426.)

J. S. Locke's liability depends entirely upon the construction we have given in article six of the agreement. He guaranteed the faithful and full performance by the agent named in the foregoing, of all the agreements and engagements therein. If W. F. Locke guaranteed the notes

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by making the proper indorsement thereon, then he performed his agreement in that respect, and the defendant would not be liable. J. S. Locke did not guarantee that the agent would pay the notes which he might take from purchasers of the plaintiff's goods, but only that such agent should guarantee the payment. There is no breach of the agreement shown to charge the respondent. The court below did not, therefore, err in sustaining the demurrer to the complaint.

The judgment appealed from must be affirmed.

[Filed June 21, 1892.]

JOSEPH MANAUDAS v PETER MANN ET AL.

TRUSTS—NOTICE TO PURCHASER.—A party who, having knowledge of facts and circumstances which impress a trust on land, whether express or implied, acquires title thereto, takes the same charged with the trust, and stands in no better position than a party to the trust.

22	526
25	531
26	549
30*	422
35*	847
37*	56
38	526
27	236

STATUTE OF LIMITATIONS—TRUSTEE AND CESTUI QUE TRUST.—As between trustee and *cestui que trust*, in the case of express trust, where the latter seeks relief against the former, the statute of limitations has no application, because, among other reasons, the law will not permit the trustee to begin to hold adversely until he shall have first restored the property to the real owner, and given notice of his own interest.

Baker county: JAMES A. FEE, Judge.

Plaintiff appeals. Reversed.

The complaint is in substance as follows:—

First—That on the thirty-first day of December, 1877, the defendant Peter Mann, for a valuable consideration, executed to plaintiff his certain bond for a deed wherein and whereby in consideration of the covenants and agreements on the part of the plaintiff to be kept and performed, he, the said Peter Mann, agreed and bound himself that within three months from said date, plaintiff having first performed his agreement to pay the said Mann three hundred dollars, as by the said bond provided, to execute to

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said Manaudas or his assignee a good and sufficient deed for all the following described real property, to wit, lot two in block two in Fisher's addition to Baker City, Oregon.

Second—That on the twenty-fifth day of March, 1878, plaintiff assigned the bond and all his rights thereunder, together with a large amount of other property, to S. A. Heilner & E. D. Cohn, which assignment, though absolute in form, was in truth and in fact a mortgage to said Heilner & Cohn, conditioned, among other things, that in case said Manaudas should pay or cause to be paid to said Heilner & Cohn the sum of one thousand nine hundred and eighty-one dollars and interest from March 26, 1878, or at any time before January 1, 1880, said assignment should be null and void, and said Heilner & Cohn should deed back all said property to plaintiff.

Third—That on March 26, 1878, and for a long time before, the defendant Peter Mann was and ever since has been fully cognizant of the terms of said assignment to said Heilner & Cohn, and knew that said assignment was in fact a mortgage conditioned as above, and at said time was and ever since has been fully apprised of and had full knowledge of all the term and conditions of said agreement.

Fourth—That on the said twenty-sixth day of March, 1878, said Peter Mann, in accordance with the terms of his bond to plaintiff, executed and delivered to said Heilner & Cohn a deed for said lot two in said Fisher's addition to Baker City, Oregon; that said deed, though absolute in form, was executed to and received by said Heilner & Cohn in trust for this plaintiff, and in accordance with the agreement between the plaintiff and said Heilner & Cohn concerning said assignment above set out, and that said Peter Mann was at said time informed and fully understood that said deed was made to said Heilner & Cohn in trust for the plaintiff, and the nature of the trust.

Fifth—That said defendants Peter Mann, S. A. Heilner, and E. D. Cohn, thereupon conspired and confederated

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together for the purpose of defrauding this plaintiff out of said property, and on the nineteenth day of September, 1879, so conspiring and confederating together, and for said purpose, and when the time had not expired wherein the plaintiff might pay said Heilner & Cohn said one thousand nine hundred and eighty-one dollars and interest, said Heilner & Cohn executed to said Peter Mann a deed for all the following portion of said lot two in block two in Fisher's addition to Baker City, Oregon, to wit, commencing at the southwest corner of said lot number two; thence extending east one hundred feet; thence north twenty feet; thence west one hundred feet; thence south twenty feet to the place of beginning; that said deed was executed by said Heilner & Cohn to said Peter Mann without any authority on the part of said Heilner & Cohn to execute the same, and without the knowledge or consent of this plaintiff, and against plaintiff's wish and desire; that at the time of receiving said deed, said Peter Mann was fully aware of the terms upon which said Heilner & Cohn held said property, and that they were not authorized to sell it, and that said deed was executed against the plaintiff's wish, and without plaintiff's knowledge or consent; that in accordance with the terms of said contract, entered into March 26, 1878, between the plaintiff and said Heilner & Cohn, plaintiff duly paid and discharged said indebtedness of one thousand nine hundred and eighty-one dollars and interest from March 26, 1878, to said Heilner & Cohn, and demanded of them a deed for said lot two in block two in said Fisher's addition to Baker City, which deed the said Heilner & Cohn refused to execute; that thereupon said plaintiff brought suit to compel said Heilner & Cohn to execute said deed, and for an accounting against said Heilner & Cohn, and on June 11, 1885, by decree of the supreme court of the state of Oregon, in said suit, it was ordered and considered that said Heilner & Cohn execute to plaintiff a deed for said lot two, above described, upon plaintiff

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paying said Heilner & Cohn the sum of six hundred and seventy-five dollars; that thereupon, and on the fourteenth day of November, 1885, plaintiff paid the said Heilner & Cohn the sum of six hundred and seventy-five dollars, and said Heilner & Cohn executed and delivered to said plaintiff a deed for said lot two in said block two, above described; that said E. D. Cohn died on or about the — day of November, 1887; that said Peter Mann is now and ever since the nineteenth day of December, 1879, has been in the possession of said south twenty feet by said one hundred feet of said lot two in said block two, as above described, and had collected the rent therefor since said December 19, 1879, to the amount of five thousand six hundred dollars; wherefore, plaintiff prays for judgment and decree herein, that said Peter Mann be declared a trustee of the legal title of said property for plaintiff's use and benefit, and that the possession of said Mann of said property be declared to be as trustee for the plaintiff.

The defendant Mann demurred to the complaint for the reasons:—First, that the said complaint does not state facts sufficient to constitute a cause of suit against the defendant, Peter Mann; and, second, it appears upon the face of said complaint that said suit has not been commenced within the time limited by the code. The demurrer was sustained by the court, and a final decree entered dismissing suit and for costs, from which the plaintiff has appealed.

John M. Gearin, and J. L. Rand, for Appellant.

T. H. Crawford, for Respondents.

STRAHAN, C. J.—At the trial of this cause in this court, respondent's counsel argued both the grounds specified in his demurrer. Their examination, therefore, becomes necessary to a proper disposition of this case. In *Manaudas v. Heilner*, 12 Or. 335, much of the history of this controversy is noted. In that case, it appeared that the appellants Heilner & Cohn had sold the barber shop for six hundred

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and seventy-five dollars. It did not then appear, it seems, that the barber shop included lot two in block two in Fisher's addition; but inasmuch as the appellants had credited the plaintiff with six hundred and seventy-five dollars on their exhibits, he should not have the property back unless he paid the appellants that sum. This adjudication fixed the amount that the appellant was to pay in order to be entitled to a re-conveyance of his property; and it is alleged in the complaint, and admitted by the demurrer, that he did pay to said Heilner & Cohn the said sum of six hundred and seventy-five dollars, on the fourteenth day of November, 1885, and that on that day they executed to plaintiff a deed for said premises. If Heilner & Cohn had not, prior to that date, conveyed said property to Mann, the effect of their deed to the plaintiff would have been to restore to him his property. It is now insisted that whatever title Heilner & Cohn had in said property had been transferred by them to the defendant; that their interest was six hundred and seventy-five dollars; that by their deed that interest was conveyed to Mann, and that sum must be paid to the defendant before the commencement of a suit against him; in other words, the payment of this money to him is a condition precedent to the plaintiff's right to be heard in a court of equity. The defendant Mann, after he had performed his agreement with the plaintiff to convey this property to the plaintiff or his assigns, by actually conveying the same to Heilner & Cohn, had no further interest or concern in the business. His connection with the transactions then properly terminated. If he thereafter interfered in the matter, he is in the same situation any other person would have been in who undertook to purchase of Heilner & Cohn what they had no right to sell or convey.

In this case, the defendant Mann took the deed from Heilner & Cohn with knowledge of all the facts and circumstances under which Heilner & Cohn held the same.

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Whatever right he acquired under the deed was for the plaintiff's use and benefit, and he held simply as the trustee for the plaintiff. He has been in the possession of the property for a long time, receiving the rents and profits. It stands admitted on the record that the amount of the rents and profits which he has actually received exceeds five thousand dollars. In such case he is in no condition to demand the payment to him of this six hundred and seventy-five dollars before the plaintiff can have a standing in court. He already has a large amount of the plaintiff's money in his hands, for which he is liable to an account, and it does not appear to us that Mann is in a situation to demand the payment of this money. The first cause of demurrer is therefore not well taken.

The other objection presents the question whether or not the plaintiff's suit is barred by the statute of limitations. In determining this question, something depends on the character of the title to the property which Heilner & Cohn acquired and the capacity in which they held the same. It was not contended that they owned the property absolutely; but it is claimed by the plaintiff that the property in their hands constituted an express trust, while the defendants claim that the trust was only implied. "All possible trusts," says a learned American author, "whether of real or personal property, are separated by a principal line of division into two great classes—those created by the intentional act of some party having dominion over the property, done with a view to the creation of a trust, which are express trusts; those created by operation of law, where the acts of the parties may have no intentional reference to the existence of any trust—implied or resulting, and constructive trusts." (2 Pom. Eq. Jur. § 987.)

Without entering more minutely into a discussion of the various classifications of trusts, this most general division suffices for the present. The trust in this case was created by the intentional act of the plaintiff in

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making the assignment to Heilner & Cohn, by means of which they were authorized to demand of Mann the conveyance of the legal title to the property, pursuant to the terms of his bond. The legal title, when thus acquired, was held by them in trust for the plaintiff under and pursuant to the express authority they had for its acquisition. When Mann took the title to this property from Heilner & Cohn, it was with full knowledge of the capacity in which they held it, and of the plaintiff's rights therein; and, therefore, he took it impressed and affected by the same trusts by which it was affected when Heilner & Cohn held it. The deed of Heilner & Cohn to Mann did not change or affect the rights of the parties in this property in any way except that by that conveyance Mann became the trustee instead of Heilner & Cohn.

Having said this much as to the nature of this trust, it remains to ascertain whether or not the plaintiff's rights are barred by the statute of limitations. This question was considered in *Decouche v. Sevetier*, 3 Johns. Ch. 190; 8 Am. Dec. 478, and it was there held that no time bars a direct trust as between the trustee and *cestui que trust*. The Chancellor added: "The settled rule is (and so it was recently declared by the Master of Rolls, in *Cholmondeley v. Clinton*, 2 Mer. 360,) that so long as the trust subsists, the right of the *cestui que trust* cannot be barred by the length of time during which he has been out of possession, and that he can only be barred by barring and excluding the estate of the trustee." So it was held in *Prevost v. Gratz*, 6 Wheat. 482, that, generally, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief. The principle is stated as elementary, that as between trustee and *cestui que trust* in the case of an express trust, the statute of limitations has no application, and no length of time is a bar. (2 Perry on Trusts, 863.) Many reasons might be given for this rule, but one seems entirely satisfactory to us.

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The trustee holds in right of the *cestui que trust*, and the law will not permit him to begin to hold adversely until he shall first have returned the property to the real owner, and given notice of his own interest. As long as he holds in the right of the *cestui que trust*, his possession cannot be hostile or adverse.

These conclusions require a reversal of the decree, and it remains to make some suggestions as to the decree to be entered. The defendant stands in the shoes of Heilner & Cohn; and the plaintiff in the former litigation with them established his right to the relief which he seeks as against them, and we are not disposed to send the case back with leave to the defendant to answer generally. A decree will therefore be entered here that the defendant convey the property in controversy, by good and sufficient deed, to the plaintiff within sixty days after the entry of the decree in the court below; and that in default thereof, the decree operate to transfer the title and stand in lieu of such deed.

It does not appear from the complaint that Mann actually paid Heilner & Cohn the six hundred and seventy-five dollars; but if he did, he knew the property belonged to the plaintiff, and did so in his own wrong. If Mann paid to Heilner & Cohn the six hundred and seventy-five dollars, then they have received it twice,—once from the plaintiff under the order of this court, and once from Mann. We do not think Mann's conduct in these transactions put him in a favorable light, or recommend him to the favor of a court of equity. If he paid this money to Heilner & Cohn, he must pursue such remedy as the law affords, if any, to reclaim it from them.

The cause will be remanded to the court below, with the suggestion that the defendant Mann be permitted to answer in relation to the rents and profits he has received, and also as to the value of any improvements he may have placed upon the lot, taxes paid by him, etc.; that an account

Points decided.

be taken between the parties, and that the court make such further decree thereon as equity and justice shall require.

[On a rehearing of this case, the respondents were permitted to apply to the court below for leave to answer on condition that they deposit with the clerk there the sum of six hundred and seventy-five dollars and interest thereon since the payment thereof to Heilner & Cohn by the appellant, the same to remain on deposit there until otherwise disposed of by order of the court below.—REPORTER.]

[Filed June 21, 1892.]

CHARLES H. FISHER v. OREGON SHORT LINE, ETC. RY. CO.

EVIDENCE—EXPERT TESTIMONY—HARMLESS ERROR.—When the matter under consideration before a jury is of that character about which any one of ordinary intelligence, without any peculiar habits or course of study, is able to form a correct opinion, expert testimony as to such matter is inadmissible; but when, upon the whole case, it is manifest that if such testimony had not been introduced, the jury could not have reached a different conclusion from that expressed in the opinions of the experts, the admission of such evidence will be regarded as a harmless error.

MASTER AND SERVANT—VICE-PRINCIPAL—FELLOW-SERVANT—NEGLIGENCE.—

An employe engaged in the performance of some duty which the master owes to the servant,—such as that of a railroad company to furnish a reasonably safe track and roadbed whereon its trainmen may operate its cars,—is a vice-principal as distinguished from a fellow-servant; and his negligence causing injury to such servant will render the master liable.

PRACTICE IN SUPREME COURT—APPEALS—BILL OF EXCEPTIONS.—The practice of incorporating in a bill of exceptions all the testimony taken in the court below, whether pertinent to the exceptions or not, is condemned as being contrary to the statute defining what a bill of exceptions should contain.

Union county: J. A. FEE, Judge.

Defendant appeals. Affirmed.

W. W. Cotton, and Zera Snow, for Appellant.

J. H. Slater & Sons, R. & E. B. Williams & Carey, for Respondent.

22	533
23	319
30*	425
31*	706
32	533
33	181
34	251
34	265
22	533
38	299
22	533
42	233

Opinion of the court—LORD, J.

LORD, J.—This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant in suffering its railroad track to be obstructed by a slide of snow, earth, and gravel, at a point named on its road, whereby the train, of which plaintiff was conductor, and upon which he was riding, was thrown from the track, and he was injured. The defense set up is contributory negligence; and as relevant to the matter under review, the defendant alleged that its track had been obstructed for one or two days prior to the accident; that the plaintiff and other men with him went out on a work train for the express purpose of removing slides of snow and earth which had accumulated on the track, so that trains might pass over it; that the plaintiff had full knowledge of the obstructed condition of the track; that at the time of his injury, the plaintiff was in charge of the train, which was being run by the engineers at a dangerous rate of speed, and without keeping a good lookout ahead of said train, in consequence of which the train struck a slide of snow and earth, and was thrown from the track.

Under this defense, the defendant claimed, and sought to establish—first, that the plaintiff assumed as part of his contract of employment the risk of the train striking such an obstruction on the railroad track as that out of which his injury arose; and, second, that the plaintiff's injury was the result of his own negligence in allowing the engineer to run the train at an excessive or dangerous rate of speed without keeping any lookout for obstructions on the track.

The evidence shows that prior to the day of the accident, a good deal of snow had fallen, which the wind, in some places, blew into drifts. Orders had been given that regular trains would not be run. The plaintiff was employed as a conductor of a freight train. On the day of his injury, he received an order from the trainmaster as follows: "To engineers 83 and 86 (engines 83 and 86 coupled)—Con-

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ductor Fisher will run extra from Kamela to La Grande." Soon after this order was received, the two engines named were coupled to a caboose and started from Kamela to La Grande. Hooker was the engineer of 83, the forward engine, and upon it the plaintiff rode. In the caboose was the roadmaster with several shovelers. When near a place called Stumptown, some fourteen miles from Kamela, the train ran into a slide of snow and gravel, and engine 83 was thrown from the track into the Grande Ronde river. Both the plaintiff and Hooker, the engineer, went down with it into the river, and the plaintiff was so injured that subsequently his leg had to be amputated. At the point where the accident occurred, the roadbed is cut into the side of a hill, and the road forms a curve, so that the place where the slide obstructed the track could be seen some two or three hundred yards, but not so definitely as to determine whether it was a slide or a drift. The snow-plow had been through on the track the day before, and the plaintiff and engineer had a right to suppose that the track was free from obstructions. There were several light drifts of snow blown on the track at places, but they were not very deep, and were of light, soft snow. The engine was not equipped with a regular snow-plow, but it had a sheet-iron protection on the pilot to clear the drifts of snow from the track. The day was fair and bright. When the engine would run into these snow drifts, the engineer would shut the cab windows, as it would cause the snow to fly in all directions, and cover the windows so as to obstruct the view for a moment; but as soon as the drift was passed, the side window would be opened, from which a lookout could be kept. The window was open when the engine passed the section men at the crossing. It was closed in passing a snow drift just before the engine struck the slide; but owing to the curvature of the road, if the window had been open at the time, it is doubtful if the result would have been different, as it was not possible for them to distinguish that it was a slide until

Opinion of the court—LORD, J.

the engine got close to it. Carlestone testified that he and Chamberlain saw this slide, and reported it to the section foreman on the evening before; that when he saw it, he could see that it was a slide and not a drift; that the rest of the track was good, and that he did not find anything on the track except the slide. Chamberlain testified that he too saw it the evening before; that he could see where two or three slides had come from two or three hundred feet up the mountain, and could see that they had made a slide across the track, and not a drift of snow, and that he reported it that evening at Hilgard to the section foreman.

There is a difference between a slide and a drift; and the testimony of these two witnesses, as well as others, seems to take it for granted that a slide is dangerous. Slides come from the sides of the mountains, and are usually mingled snow and gravel and rock, and necessarily a dangerous obstruction on a track. These two witnesses had been sent out by the section foreman Lee as track walkers, to examine the track;—to go over it and see what condition it was in, and to report the condition of the track to him. This they did; yet this section foreman, with this knowledge of the condition of the track, utterly neglected to investigate the matter himself, or to give warning of the condition of the track at the place of this slide. The foreman was at a telegraph station, but not even a message was sent to the roadmaster or train dispatcher. Neither the plaintiff nor the engineer knew of the location of the slide. The blockade was east of that point; and when they received orders to run extra to La Grande, they had reason, on this account, to rely on a safe track, as well as to suppose that the road was open and in running order from the fact that the snow-plow had gone over the track to La Grande the day previous. Madden, the roadmaster, whose duty included superintending section men and keeping obstructions from the track, testified that he had no reason to anticipate that any slide would

Opinion of the court—LORD, J.

be encountered at that point. Nor is this all. When the train passed the foreman on the road at a crossing only a short distance from the place where it struck the slide and fell over into the river, he neither gave those in charge of it any warning nor put up any signals to warn them of the danger. The testimony indicates that at the time the engine struck the slide, it was being run at the rate of fourteen or fifteen miles an hour. Hooker, the engineer, testified that the engine was running at the rate of fifteen miles an hour when it struck the slide; that he had been an engineer seventeen years. Then he was asked: "Is that the fastest rate of speed?" Answer—"No, sir; it is not." Question—"How fast can an engine be safely operated on a track in the condition that was in between Kamela and the place where the accident occurred?" Defendant objected, and the objection was overruled. A.—"Twenty miles an hour." Q.—"What was the condition of the track up to that point as you found it in making that run?" A.—"Very good so far as the track was concerned; I could not say anything about it; there was some snow on the track." Q.—"Did you meet with any obstructions or slides?" A.—"No, sir; not to amount to anything; there were no slides of any kind; there were some little drifts of snow across the track." A like objection was raised to the testimony of the plaintiff when recalled, as follows: Q.—"From your experience as a railroad man, and your knowledge of the railroad track as it existed between Kamela and the place of accident, state whether or not the rate of fifteen miles an hour is a dangerous rate of speed?" (Objected to and overruled.) A.—"No; I would not consider it so." Q.—"How fast can a train, such as this was and under the circumstances under which this train was running there at that place, run with safety, in your opinion?" (Same objection.) A.—"A train might run with perfect safety along that point of track anywhere from twenty to twenty-five miles an hour."

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The objection to this testimony is, that the opinions of Hooker and Fisher were not necessary to aid the jury in determining whether the rate of speed was safe; that the question presented by the case was not one requiring any expert knowledge. The general rule undoubtedly is, that witnesses must ordinarily state facts, and not give their opinions. Our code provides that on the trial evidence may be given of the opinion of a witness on a question of science, art, or trade, when he is skilled therein. (Hill's Code, § 706.) When the matter under consideration is of that character that any one of ordinary intelligence, without any peculiar habits or course of study, is able to form a correct opinion, it is manifest that the opinion of an expert as evidence is inadmissible. In such case, his opinion could not operate to aid the jury, but would only serve to anticipate and usurp their duty; nor will it render such opinions admissible as evidence because the witness may be able to reason more logically, or to form a better opinion than the jury. Mr. Rogers says: "The testimony of experts is inadmissible upon a matter concerning which, with the same knowledge of facts, the opinion of any one else would have as much weight. It is only admissible when the facts to be determined are obscure, and can only be made clear by and through the opinions of persons skilled in relation to the subject matter of inquiry." (Rogers, Expert Testimony, 14.)

When the nature of a question is such that a man of ordinary intelligence and experience is incapable of drawing correct conclusions from the facts in evidence without the assistance of some one who has special skill or knowledge on the subject, the opinion of an expert is desirable and competent evidence. Chief Justice SHAW said: "It is not because a man has a reputation of superior sagacity and judgment and power of reasoning, that his testimony is admissible; if so, such men might be called in all cases and advise the jury, and it would change the mode of trial;

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but it is because a man's professional pursuits require peculiar skill and knowledge in some department of science not common to men in general, which enables him to draw an inference, when men of common experience, after all the facts proved, would be left in the dark." (*N. E. Glass Co. v. Lovell*, 7 Cush. 319.) It was said by the court, in *Taylor v. Monroe*, 43 Conn. 44, that "the test of the admissibility of expert testimony is not whether the subject matter is common or uncommon, or whether many or few have knowledge of it, but whether the witnesses offered have any peculiar knowledge or experience not common to the world, which render their opinions founded thereon an aid to the triers." The rule is laid down; and illustrated by cases by Mr. Lawson, that "mechanics, artisans, and workmen are experts as to matters of technical skill in their trades, and their opinions in such cases are admissible." And as corollaries or sub-rules, he further states that "nautical men are experts on the question of care in marine cases"; and "railroad men are experts as to railroad management." (Lawson, *Exp. Op. Ev.* 70.) The competency of the evidence objected to is sought to be upheld upon the ground that no particular rate of speed can be assumed to be dangerous without proof; that the jurors were not experienced railroad men, and could do no more than guess whether it was safe or not to run the train as was done under the circumstances, and that the required proof could only be offered by the testimony of those whose experience and observation have given them a particular knowledge upon the subject. There may be no doubt that the conductor and engineer based their statements or testimony upon their observation and experience as railroad men. Under the circumstances, it was their opinion, in the light of their experience and knowledge as railroad men in the operation of trains, that the rate of speed at which the train was running was not excessive or dangerous; that its rate of speed, under existing conditions, might have been increased

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with safety; but it is where matters of technical skill or scientific knowledge are involved, that the opinions of mechanics and artisans are admissible. While it is true that what is or is not dangerous, is sometimes a question that can only be properly answered by experts, as some of the cases indicate (*Cross v. Ry. Co.* 69 Mich. 363; 13 Am. St. Rep. 399; *Chicago etc. R. R. Co. v. Gregory*, 58 Ill. 272; *Huizega v. Culler etc. Co.* 51 Mich. 272; *R. R. Co. v. Shannon*, 43 Ill. 338; *Bridger v. R. R. Co.* 25 S. C. 24); yet they are not cases like the present.

The opinion asked here goes to the merits. It seems to us, upon the facts as disclosed by the record, the jury was competent to form an opinion, or draw the proper conclusion from the facts, without the opinion of the witnesses upon the subject. It is not material that the evidence would not justify that construction put upon it by the defendant, or that the witnesses understood it differently, as its competency depends upon a state of facts involving technical skill, or knowledge, which the facts in question did not present for consideration. The defendant contended that, under the conditions presented by the evidence, the running of the train at the rate of fifteen miles an hour, without keeping any lookout, was dangerous, and negligence in the plaintiff contributing to his injury. While the witnesses expressed the opinion, that under the circumstances the rate of speed was not excessive or dangerous, and that it might have been increased without liability to accident, yet the opinion being such as touched the merits, and upon a subject matter that involved no technical skill or knowledge, and which the jury was competent to decide, we think the opinions of these witnesses as evidence was inadmissible, and that it would have been more consonant with the rules of evidence to reject it. But the question arises, whether upon the facts the jury could have formed any other opinion, or reached any different conclusion from that expressed by these witnesses, for, if they could not,

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the error could affect no substantial right of the defendant, and was not reversible error.

The contention of the defendant was, that the evidence tended to establish the defense pleaded,—that the plaintiff was employed upon a work train, and went out with it upon a track known to be obstructed for the purpose of removing such obstruction; that with such knowledge and upon a road thus obstructed, he permitted the train to be run at an excessive rate of speed, without keeping any lookout, and when the snow was plastered over the windows so that neither he nor the engineer could see ahead; that under these circumstances, and in violation of the rules of the defendant as to the rate of speed to be used in such case, and in violation of their duty, they recklessly ran the train into the slide and caused the accident. If this were a proper construction of the facts, or if upon any such state of facts the opinion of these witnesses had been based, we should feel no hesitation in declaring such evidence not only inadmissible, but such error as would entitle the appellant to a new trial.

The telegraphic order received by the plaintiff was not to work, but to run extra,—that is to say, that the orders which he and the engineers received show that they were led to believe that they had a clear track from Kamela to La Grande as an extra, and not that they were to work between those points. If those in charge of the train had been instructed to clear the track of obstructions, or do other work on their way to La Grande, their orders would have been in an entirely different form, as the rules, which are made a part of the so called bill of exceptions, disclose. A rotary snow-plow had gone through over the track the day before to La Grande, and the roadmaster and other officers supposed and thought the road was open to La Grande from Kamela, where Fisher and his train were, and where the roadmaster was with a gang of shovellers in a caboose. It was between La Grande and Huntington

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that the road was blockaded; and the rotary plow in clearing it, broke, so that the roadmaster, Madden, was telegraphed for from La Grande to bring his shovellers to that place. Fisher, as conductor, and the engineers then received from the train dispatcher their running orders to La Grande, in the course of which journey the accident occurred, as already detailed.

It is plain from the telegraphic correspondence between the roadmaster and the train dispatcher that there was no blockade or obstruction thought of between Kamela and La Grande; and in view of the other facts already stated the plaintiff had no reason to suppose that he was on a working train for the purpose of aiding in removing obstructions from the track, or that the track was obstructed, or that he was performing any other than his customary duty as freight conductor in the run from Kamela toward La Grande. Nor was the train run without any lookout, or the cab windows so covered with snow, or kept closed that they could not see out. It was only when passing through the drifts of snow that the windows were closed, and then only for an instant, as has been already sufficiently explained. The track was not out of order, or in any condition of obstruction except at the slide, which had been reported by the track walkers to the section foreman. The track walkers did not report the drifts of snow between the slide and Hilgard, for they did not consider them of sufficient importance; but they did report the slide as coming from the mountain, showing that they did consider it as something that merited more than ordinary consideration, and the foreman must have so understood it. Nor until the engine struck the slide, did they meet with any obstruction upon the track in the run, showing again that the track walkers had reported truly the only obstruction on the track which required to be attended to before a train should be started without notifying its officers of its location. Under these conditions and circumstances, there is

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no rule of the defendant company that the running of a train at the rate of fifteen miles an hour is excessive or reckless; on the contrary, it and even a greater rate of speed are permissible. Madden, the roadmaster, the only one of the defendant's witnesses upon the train, or who knew anything about it, expressly says that under the circumstances he did not consider it dangerous to run at the rate of speed at which the train was going; that he had no reason to expect that the train would run into a slide, or that there was such an obstruction upon the track; that he did not usually interfere in any way, as he calculated the men running the train had common sense, but that he would have interfered if he had thought there was any need of it. So that, in view of the whole record, the opinion expressed, that the rate of speed at which the train was running when it struck the slide was not excessive or dangerous, is correct, and beyond dispute upon the facts, and only such a conclusion as the jury must have drawn from the facts. So far as the verdict is concerned, then, it could not have been different if the expert evidence had not been admitted.

There is but one other point we deem it necessary to consider. It is in relation to an instruction given, which, it is claimed, assumes without qualification that track men and the plaintiff were not fellow-servants; that trainmen and section men may be, and frequently are, fellow-servants, is not disputed, and no authorities need to be cited.

In *Wellman v. Oregon Short Line, etc. Ry. Co.* 21 Or. 530, which involved substantially the same pleadings and issues, —Wellman being on the same train as fireman, and killed by the same accident,—it was said by this court: "To avoid misconception, a single observation in relation to instruction number seven seems to be necessary. It is as to the effect to be given to the knowledge acquired by the trackmen or section master on the fifteenth of January, the day before the accident. There is evidence tending to

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show that on that day these persons saw the slide that caused the injury, and communicated the fact to the section foreman the same evening. If such was the fact, he was bound to communicate the information to those in charge of the train which was to pass over the road, and the failure to do so would subject the defendant to liability independent of anything that has already been said." This was based on the theory that section men are vice-principals when engaged in the performance of some duty which the master owes to the servant, or is bound to perform. It is sought to avoid the effect of such conclusion in the present case by claiming that the evidence shows that, at the time of his injury, the plaintiff was employed on a work train that went out for the express purpose of removing obstructions upon the track between Kamela and La Grande; that he took charge of such train with full knowledge that the road was obstructed or blockaded, for the purpose of finding, and to aid in removing, such obstructions; and hence, the defendant claims that it was not his duty to notify or inform the plaintiff that the track was obstructed, nor to remove any obstruction upon the track before the plaintiff's train should reach them, as this was the identical work that he was going out to do. Upon this assumption of the facts, the defendant claims that liability to injury from obstructions upon the track was incident to the plaintiff's contract of employment, and a risk he voluntarily assumed. In support of this contention, it cites and relies upon the case of *Carlson v. Oregon Short Line, etc. Ry. Co.* 21 Or. 454. That case has no application to the facts involved in the present case. There, it was held that a servant engaged in repairing a railroad track, already known to him to be in a dilapidated condition, assumes as part of his contract of employment the risks incident thereto, among which is the dilapidated condition of the track; but the court expressly declared that the servant does not assume the increased risk arising from neglect of

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the railway company—unknown to him, or not ascertainable by ordinary diligence—to use proper care to learn the condition of the track, and to prevent accident to its servants. BEAN, J., says: “The fact that the track was known to be in a dilapidated condition, and out of repair, did not relieve the master from the discharge of his duty in the premises. The deceased could still exact from it the exercise of such care and vigilance, and require it to take such precautionary measures to prevent accidents as the exigencies of the case, having due regard to the safety of its servants, would suggest to prudent and cautious men, experienced in that particular branch of business.”

Within the principle declared in that case, it would hardly seem doubtful, if the facts be assumed to exist, as claimed by the defendant, that the plaintiff was going out in charge of a train to find and remove obstructions upon the track between Kamela and La Grande, that the master in the exercise of ordinary care would not have been bound to notify the plaintiff of the existence and location of this slide obstructing its track. The section foreman, whose business it was to inspect the track, and keep proper watch and oversight over it, had, in the performance of that duty of the master delegated to him, sent out two track walkers the night before the accident to ascertain the condition of the track, and they reported to him that there was a slide obstructing the track. The section foreman knew, therefore, of the existence and location of the slide the evening before the train started, and had the means by telegraph to communicate that important fact to the train-dispatcher, or he could himself have notified the plaintiff, or warned him in various ways, and thus avoided any liability to accident on account of such slide. As the foreman stands for the master in such case, it would seem to be a plain dictate of duty for the master, with due regard for the safety of its servants, and in the exercise of that care and vigilance which the exigency of the situation required, to have noti-

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fied the plaintiff of the existence and location of the slide, and thereby avoided liability to accident. If the exercise of ordinary care required the master to take some such precautionary measures to prevent such an accident to its servants, the plaintiff did not assume the risk of such slide. As BEAN, J., said in *Carlson v. Oregon Short Line, etc. Ry. Co. supra*, in speaking of the risks of the servant: "But if it were increased by the neglect of the master to use proper care before the storm to keep the bridge in repair, or to ascertain the condition of the track or bridge after the storm, or to take such due and proper precautionary measures to prevent accident to its employés, as the exigency of the situation might require, he did not assume such risks."

But we are not compelled to rely upon this aspect of the case; it is only suggested to show its character, and the difficulty of giving it any solution consistent with the exercise of due care in the premises. The case here is wholly different upon its facts. As they have already been detailed, it is unnecessary to repeat them; but it will be enough to summarize some of them to show the inapplicability of the theory of the defence to them. The plaintiff was not on a work train sent out to clear obstructions from the track between Kamela and La Grande. Nor did he take charge of the train with any notice or knowledge that his duties involved such work, or other than his customary duty in running the train between Kamela and La Grande. For various reasons, he had a right to suppose that the track was clear or free from obstructions, except light snow blown into drifts, and that the blockaded track was between Huntington and La Grande. The shovelers were being carried to La Grande. The roadmaster in charge of them says he had no reason to expect that they would run into a slide, or that they were running at a dangerous rate of speed. Upon this state of facts, the risks incident to a track known to be obstructed with slides of snow and earth, as constituting a part of the contract of one accepting service upon

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it, can have no application. In accepting his employment, and running the train between Kamela and La Grande, the plaintiff did not assume, as a part of his contract, the risks arising from a track obstructed with slides of snow and earth. Nor did the plaintiff know that the track was obstructed by a slide, but the defendant, through its foreman, knew of its existence and location. But to avoid the effect of this, it is said that the track walkers did not report it as dangerous; hence, it is argued that the foreman had no knowledge that any obstructions dangerous to the passage of trains were to be found upon the track any where along his section. But they did report it as a slide coming from the mountain; and the difference between a slide and a drift has been sufficiently adverted to as showing the danger of the former when it obstructs the track. They did not report the snow drifts across the track, but they did the slide that had come down the mountain and obstructed the track; and as indicating that they understood the difference, and the duty of the foreman, when the slide was reported, to give notice of its existence and location, at least, the result verified; the train experienced no difficulty in running through the snow drifts, but went to destruction when it encountered the slide. It was clearly the duty of the foreman to have communicated to those in charge of the train the information he received of the existence of this slide obstructing the track, and the failure to do so was negligence for which the defendant is liable. We do not deem it necessary to pursue the record further. We have examined it fully and carefully, and we do not think, upon the entire record, that any substantial right of the defendant has been ignored or prejudiced; and though there may have been a mere technical error in the admission of the expert evidence, yet it is not possible to see upon this record how the verdict could have been different if such evidence had not been admitted.

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The bill of exceptions, so called, in this case, contains the entire evidence, oral and documentary, all the instructions pro and con, and in fact is a transcript of the whole proceedings as extended from the short-hand report of the trial. Necessarily such a bill of exceptions is filled with much surperfluous and irrelevant matter, imposing needless expense on the parties and much increased labor upon us. As the judgment was large, we have felt bound to examine the evidence carefully, so as to ascertain the facts involved upon which error is predicted, and then apply the law. This we have done with the above result, in the hope that hereafter the bill of exceptions will contain no matter not essential to explain the exceptions.

The judgment is affirmed.

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[Filed June 21, 1892.]

JAY GUY LEWIS v. GEORGE HENDERSON ET AL.

VENDOR'S LIEN—SUBSEQUENT INCUMBRANCES—NOTICE.—Whether vendors' liens exist in this state or not, they cannot affect subsequent claimants or incumbrancers of the property who have no notice of the lien.

Union county: JAMES A. FEE, Judge.

Plaintiff appeals. Affirmed.

B. F. Wilson, for appellant.

Frank L. Moore, for respondent.

LORD, J.—This is a suit brought by the appellant to establish and foreclose a vendor's lien, the lien claimed being for the balance of the purchase price of quartz mining property sold and conveyed by the appellant and his wife to the defendant George Henderson by deed, dated on the twenty-third day of November, 1889, and which was mortgaged by said defendant George Henderson to defendants C. W. James and the Baker City National Bank by two mortgage deeds, dated on the twenty-third day of

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April, 1890, and the twenty-ninth day of January, 1891, respectively. The complaint alleges the execution and delivery of the deed to the mining property therein described to the defendant Henderson for the consideration of two thousand dollars, and that the sum of five hundred dollars is due and owing from the defendant Henderson to the plaintiff as a balance of the purchase price, etc. The defendant Henderson denies all the allegations of the complaint, and sets up by way of counter-claim certain matters to which it is not necessary to further advert.

The answer of the defendants Baker City National Bank and C. W. James alleges that neither the Baker City National Bank, nor any of its officers, nor C. W. James, had any knowledge or notice of a vendor's lien, or any lien whatever, existing against the mining property described, at the time of the advance of money to the defendant Henderson, or at the time of the execution and delivery of the deed, or that any portion of the purchase price remained unpaid; that the defendant Henderson was in possession of the property, claiming to be the owner in fee simple, and that the appellant and his wife executed and delivered to the defendant Henderson the deed for the property named, duly acknowledged and certified, which was duly recorded, etc.; that the defendant Baker City National Bank, by C. W. James, its cashier, relying upon the genuineness of the deed, and the statements of the defendant Henderson, that the property was free from all incumbrances whatsoever, lent and advanced to the defendant Henderson, on divers dates, the amounts alleged, etc., and that to secure the payment of the same, etc., he so made and executed a deed to said Baker City National Bank to certain mining property described in the complaint, and that said deeds were intended as mortgages, etc.

The reply puts in issue all the material allegations set up in the answer. The cause was referred to a referee, who reported the facts and his conclusions of law adversely to

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the plaintiff, which were sustained by the court below. As the whole record is before us, and as cases in equity are tried *de novo*, we shall decide this case upon its merits, without regard to technical objections. Nor do we deem it necessary to set out the evidence upon which our conclusions are founded. For the purposes of the case, we shall assume that the doctrine of a vendor's lien prevails in this state, although the question of its existence has not been definitely settled. The plaintiff is only questioning the correctness of the decree as to the defendant the Baker City National Bank, and to it the appeal must be confined. No other part of the decree is involved, and no other parties are raising objections. The record discloses that there was some testimony tending to prove that the plaintiff released the defendant Henderson from the payment of the balance of the purchase price on the mining property involved, and that the lien he now seeks to establish and foreclose was released and waived before the business transactions which took place between the defendant Henderson and the defendant the Baker City National Bank, had occurred. When the situation of the parties is considered, the pleadings and the conduct of the plaintiff in reference thereto, and the answers of the plaintiff respecting the release, the conclusion is almost irresistible, that if the plaintiff ever had a lien, he released and waived it. But in addition to this, the testimony shows that while the defendant was in possession of the property by virtue of a deed from the plaintiff and wife, which was duly recorded, the financial transactions occurred, and the instruments already referred to were executed to secure the payment of the same. The record disclosed no incumbrances against the property, and the uncontradicted testimony shows that at the times of lending the money to the defendant Henderson the officers of the bank had no knowledge of any incumbrances upon the property, or any notice directly or indirectly at the time of taking the security upon it, of the existence or

Statement of the case.

claim of any lien for the balance of the purchase price. When the defendant Henderson offered the property as security for the money advanced, and the inquiry was made by the bank officers as to any incumbrances upon it, he represented that there were none; and he assigns as his reason for doing so that Mr. Lewis had released him from any liability upon the property. In a word, that he considered that he had been released when the plaintiff accepted the written engagement of another in lieu of his obligation to pay the balance of the purchase money on the property. There is no pretense of any fraud. The money was loaned by the bank without notice, and in good faith. The defendant Henderson was seized in fee and in possession of the land at the time he procured the loan.

In view of these facts, we do not think that the appellant had any vendor's lien,—assuming such a lien may exist in this state,—as against the defendant the Baker City National Bank, and therefore the decree must be affirmed, except that it be made to conform to the description of the property as set forth in exhibit B of defendant's answer.

[Filed June 21, 1892.]

JESSE M. ROTHROCK ET AL. v. LUCRETIA C. ROTH-
ROCK ET AL.

WILLS—TESTAMENTARY CAPACITY.—A testator was paralyzed and unable to make any communication to those about him except by signs; but it appeared that at the time his will was executed, his mental faculties were unimpaired; that he perfectly understood his business affairs and the terms of the will; and that the will correctly represented his wishes as to the disposition of his property; *held*, that he was possessed of sufficient testamentary capacity.

Umatilla county: M. D. CLIFFORD, Judge.

Plaintiff appeals. Affirmed.

This is a contest as to the validity of the will of A. B. Rothrock, deceased. After said will had been probated in

Statement of the case.

common form, the appellants filed a petition in the county court of Umatilla county, wherein they alleged, among other things, that at the time of his death the said A. B. Rothrock was about the age of seventy-four years; that in consequence of old age, and other causes, his mind was seriously impaired and shattered, and his memory destroyed; that at the date thereof, and for a long time prior thereto, and thereafter, and up to the time of his death, he was incapable of exercising any judgment whatever over his property, or in any other manner; that the mental condition of the said A. B. Rothrock, senior, at the date of the execution of said alleged will, and for a long time prior thereto, had been such that he was easily persuaded in the course of his conduct, and the attempt to make or execute the alleged will heretofore set forth, or to dispose of his estate or property as therein provided, was the result of undue influence exercised upon him, and by the said Lucretia C. Rothrock, John William Rothrock, and A. B. Rothrock, junior, and other parties acting for them and in their interest; that the said alleged will was not, in fact, the will of the said A. B. Rothrock, senior; that the value of the estate of the said A. B. Rothrock, senior, was about twelve thousand dollars, and consisted of real and personal property; that the said alleged will above described was not executed by the said A. B. Rothrock, senior, with the formality or in any manner prescribed by law, is of no validity, and is void; that the said A. B. Rothrock, senior, at the time of the execution of said alleged will, was of unsound mind, and incapable of understanding the business in which he was engaged at the time he executed said alleged will, and that said alleged will was not the product of his own free agency; that said alleged will was the result and the cause of the fraudulent and undue influence and constraint exercised upon and over him by the said Lucretia C. Rothrock, John William Rothrock, and the said Adam B. Rothrock, junior; that the said Adam B. Rothrock, senior, never

in fact signed said alleged will, or authorized or requested any one else to sign the same for him, and that in fact the said alleged will was never executed by the said Adam B. Rothrock, senior, deceased; that the said will was not made, signed, or acknowledged by said Rothrock, deceased, in the presence of said witnesses, nor did the said witnesses sign the same at his request.

In effect, the answer simply denied the material allegations of the petition, except the relationship of the parties, the probate of the will, etc.

Bailey & Balleray, for Appellants.

J. C. Leasure, and *N. B. Humphrey*, for Respondents.

STRAHAN, C. J.—No question of law is involved in this case. The entire controversy is one of fact. The appellants seek to defeat the probate of this will on the ground of undue influence; that the testator was not of sound mind when the will was executed; that it was not executed by the testator, nor with such formalities the law requires. It appears that the testator had been partially paralyzed a short time before the will was executed; but the evidence makes it clear to us that at the time the will was made his mind was unimpaired. It is true, the testator was unable to talk or to give specific directions in words as to the disposition he wished to make of his property; but the scrivener seems to have proceeded with great care and prudence, and to have elicited from him all the information necessary to enable him to write the will. This was done by asking him questions. The scrivener would commence by asking the testator questions, always framing them so they could be answered by yes or no. In this way he learned how much the testator wished to give to each child, and the provision he wished to make for his wife. This process of discovering the wishes of the testator as to the disposition of his property was slow, but the result was just as certain and satisfactory as if he could have given full

Statement of the case.

and connected directions. Besides, after the will had been written, it was slowly and carefully read to the testator, item by item, and he was asked as to each one if it suited him, and to each question he made an affirmative answer by nodding his head. He manifested his wishes as to the details of the execution of the will in the same way, and we have no doubt of their sufficiency. As to the testator's mental soundness when the will was executed, there can be no doubt. Though stricken with paralysis and remaining speechless, all the evidence concurs in the fact that his mind remained unimpaired up to the time of his death, and he did not lose either an interest or knowledge of the details of his business while he lived.

We think the court below could not have done otherwise than sustain the will, and we affirm the decree.

[Filed June 21, 1892.]

P. M. COFFIN v. JAMES H. HUTCHINSON ET AL.

NONSUIT—PRACTICE ON APPEAL.—The ruling of the court below denying a motion for nonsuit, will not be considered on appeal unless the bill of exceptions shows affirmatively that it contains all the evidence given on behalf of plaintiff at the trial.

JURY TRIALS—UNDISPUTED EVIDENCE—DIRECTING VERDICT.—When there is no conflict in the evidence, the issue between the parties is one of law, to be determined by the court; and in such cases it is proper for the court to direct the jury to return a certain verdict to conform to the facts.

Union county: JAMES A. FEE, Judge.

Defendants appeal. Affirmed.

This is an action to recover a balance of two thousand dollars, alleged to be due from the defendants to the plaintiff on account of the sale and conveyance by the plaintiff to the defendants of three hundred and forty acres of land situated in Union county, Oregon, for which the defendants agreed to pay him at the rate of fifty dollars per acre. The answer makes a qualified denial of the allegations of the

22	554
126	223
30*	424
37*	1022
22	554
29	149
29	491
29	554
33	193
22	554
35	136
35	140
22	554
41	546

complaint, by adding thereto the words, "except as herein-after alleged."

The answer contains this further and separate defense: "And for a further and separate answer to plaintiff's complaint, defendants allege that, on or about the twenty-first day of March, 1890, defendants purchased from plaintiff a tract of land in the township and range alleged in the complaint (but defendants do not know whether it is in the same section described in the complaint or not), at and for the sum of fifteen thousand dollars, and paid plaintiff the purchase price therefor; that this is the only business transaction in the nature of purchase of real estate that defendants have ever had with plaintiff."

At the conclusion of the evidence on the part of the plaintiff, the defendants moved for a nonsuit, because the plaintiff had failed to prove a case sufficient to be submitted to the jury, which motion was overruled by the court, and the defendants excepted. The defendants declining to introduce any evidence, the jury, under instructions from the court, returned a verdict for the plaintiff upon which judgment was duly entered, and the defendants have appealed.

The notice of appeal contains three assignments of error: First, error of the circuit court in overruling defendants' motion for a nonsuit; second, error of the court in instructing the jury in said cause as follows: "Gentlemen of the jury, I instruct you to find for the plaintiff for the amount claimed, to wit, two thousand dollars, with eight per cent interest thereon from March 21, 1891"; third, error of the court in entering a judgment in favor of the plaintiff upon said verdict.

J. W. Shelton, and J. M. Carroll, for Appellants.

T. H. Crawford, and R. Eakin, for Respondent.

STRAHAN, C. J.—The motion for a nonsuit cannot be considered, because the bill of exceptions does not purport to contain all the evidence given upon the trial on the part

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of the plaintiff. We think it highly probable from the course of the trial, that it does in fact contain all the evidence; but when the record fails to show it affirmatively, we cannot presume that it does. The error mainly relied on by the appellants was the direction of the court as to the verdict. None of the plaintiff's evidence is contradicted, nor are any of his witnesses attacked by impeachment or otherwise. From their evidence, it is plainly apparent that at the time the plaintiff signed the deed he did not remember or call to mind that he owned the extra forty acres included in it, but soon afterwards he called the fact to mind, and applied to have the error corrected; and the defendants, on a number of occasions, said to him that the forty-acre lot should be deeded back to him, or he should be paid for it. It is equally as apparent from the evidence that whatever and all the land the defendants purchased from the plaintiff, was to be paid for at fifty dollars per acre. That was the price settled upon by the agreement. We think that when the defendants were made aware of the mistake in the deed, and they were requested to deed back the forty acres, and neglected to do it, the plaintiff had the right to elect to sue for the price agreed upon for all the land; and that as long as the defendants retain the land, they are in no condition to make any technical contention as to the remedy the plaintiff has elected to pursue.

The general rule of practice undoubtedly is, that it is the province of the jury to weigh the effect of oral evidence, and to determine the credibility of the witnesses, and that the court cannot ordinarily interfere with that right. But this rule of practice cannot be permitted to interfere with another one equally as well settled, and that is, when there is no conflict in the evidence, no dispute as to the facts, there is nothing to submit to the jury, and the question is one of law to be decided by the court. In such cases, it is proper for the court to direct the verdict;

Points decided.

and a verdict thus ordered will be sustained if the law and facts disclosed by the evidence warrant it. (2 Thomp. Trials, § 2343; *St. Johnsbury v. Thompson*, 59 Vt. 300; 59 Am. Rep. 731.)

A fair test in such case is, if the jury, in the absence of a special direction, were to find a verdict the other way, ought it to be set aside? Testing this case by that rule, we do not hesitate to say that if the court had made no special direction in this case, and the verdict had been for the defendants, it would have been the duty of the trial court to have set the same aside, because it would have been wholly unsupported by the evidence. All the evidence is the other way. But this practice we are not disposed to encourage. The safer course is to let the facts go to the jury, under proper instructions, unless the case is such that it is the duty of the court to declare the legal effect of the evidence. In this case, however, the jury could have rendered no other verdict upon the facts before them.

For these reasons we affirm the judgment.

[Filed June 21, 1892.]

HAMILTON & ROURKE v. D. GORDON.

VENDOR AND VENDEE—CONTRACT FOR SALE OF CHATTELS.—Where, by the terms of an agreement for the sale of chattels, the vendor is to do anything with the property for the purpose of putting it into the condition in which the vendee is bound to accept it, or anything remains to be done to ascertain the quantity, where the goods are sold by weight or measure, the performance of these things, in the absence of circumstances showing a contrary intention, is a condition precedent to vesting the title in the vendee.

IDEM—BREACH OF CONTRACT—DAMAGES—REPLEVIN.—A vendee may recover damages for the breach of a contract for the sale of chattels, in case the vendor violates the contract by delivering only a part of the goods, and refusing to deliver the remainder; but replevin will not lie to recover the undelivered goods.

PRACTICE IN SUPREME COURT—BILL OF EXCEPTIONS.—This court will not strike from the files a bill of exceptions containing all the evidence given

22	557
23	319
30*	495
31*	709
22	557
29	519
22	557
35	581
22	557
36	153
22	557
43	570

Opinion of the court—BEAN, J.

in the court below, instead of only so much thereof as may be necessary to explain the exceptions, but will decline to examine the questions sought to be presented in that irregular manner.

Umatilla county: M. D. CLIFFORD, Judge.

Defendant appeals. Reversed.

H. J. Bean, for Appellant.

J. J. Balleray, for Respondents.

BEAN, J.—This is an action to recover possession of three hundred sacks of wheat, of which plaintiffs claim to be the owners and entitled to the possession. The complaint is in the usual form, alleging ownership and right to the possession in plaintiffs, and possession and unlawful detention by defendant. The answer denies the allegations of the complaint except the fact of possession by defendant, and alleges ownership and right to the possession in defendant. A trial before a jury resulted in a judgment in favor of plaintiffs, from which defendant brings this appeal. The errors assigned are in the admission and exclusion of evidence, and instructions to the jury, but the only question we deem it necessary to consider is presented by the instruction of the court to the jury.

The facts are these: In July, 1891, the plaintiffs and defendant entered into the following contract in writing:

“PENDLETON, OREGON, July 14, 1891.

“This certifies that D. Gordon hereby sells and agrees to deliver to Hamilton & Rourke, in their warehouse, or platform, at Vansycle, Oregon, on or before October 1, 1891, all the grain harvested by me, on land described below; wheat sacked in good merchantable sacks; the same being that certain crop now harvested, or hereafter to be harvested, during the current season from my certain farm in sections 17 and 18, township 5 north, range 32 east, Willamette meridian, there being about two hundred acres of said tract in crop, for which said Hamilton & Rourke agree

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to pay sixty-five cents per bushel, sacked; one dollar advanced on this contract.

(Signed,)

"HAMILTON & ROURKE.

"D. GORDON.

"Dated Pendleton, July 14, 1891.

"(Executed in duplicate.)

"Above wheat is Blue Stem."

After the grain mentioned in the contract had been harvested, there was delivered by defendant, and received and paid for by plaintiffs, one thousand six hundred and forty-two bushels of wheat, leaving two hundred and thirty-four sacks of the value of four hundred and thirty-four dollars and twenty-five cents undelivered and unpaid for, to recover possession of which this action is brought.

The contention of the plaintiffs is, that when the contract above mentioned was signed, it operated to transfer the title of the wheat from defendant to plaintiffs, and this was the view of the trial court, as it so instructed the jury and directed them to find a verdict in favor of plaintiffs for the wheat undelivered.

Whether an agreement concerning the sale and delivery of goods, in the absence of a delivery, is to be treated as an executed or an executory contract, and whether the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, or remains the property of the vendor until the contract is fully executed, is often a difficult and embarrassing question, and the books are replete with the discussion of the various aspects of the question. As between the parties, it is generally considered a question of intention; and it may often happen that the parties have expressed their intention in a manner that leaves no room for doubt; where, however, they have not done so in express terms, the intention must be collected from the agreement, and the courts have adopted certain rules for that purpose. As a general

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rule, where, by the agreement, the vendor is to do anything with the property for the purpose of putting it into a deliverable condition, or into that state in which the purchaser is bound to accept it, the performance of these things, in the absence of circumstances showing a contrary intention, is taken to be a condition precedent to the vesting of the property in the buyer; and also when goods are sold by weight or measure, and anything remains to be done for the purpose of ascertaining the quantity, in the absence of circumstances showing a different intention, the title does not pass until the goods are weighed or measured. (Benj. Sales, § 318; *Hubler v. Guston*, 9 Or. 66; 42 Am. Rep. 794; *Rosenthal Bros. v. Kahn Bros.* 19 Or. 571; *Barr v. Borthwick*, 19 Or. 578.)

By the terms of the agreement in this case, the grain was to be harvested and sacked "in good merchantable sacks" by the vendor, in order to put it in a deliverable condition, and by him conveyed to the warehouse or platform of plaintiffs at Vansycle, before plaintiffs were bound to accept or receive it or pay for the same. It is also provided that the wheat shall be paid for at a certain price per bushel, and this payment and the delivery of the grain are, by the terms of the agreement, concurrent acts; so that it was necessary that the grain should be weighed or measured in order to ascertain the quantity; and it seems clear the title would not pass until the grain was delivered at the place agreed upon, and the quantity ascertained by weight or measurement. There is nothing in the agreement or the circumstances of the case to indicate that the parties intended the title of the grain to vest in plaintiffs until it was harvested and delivered at the place agreed upon, and the quantity ascertained. In fact, it was evidently the intention of the parties at the time the agreement was entered into that the title and risk should remain in the defendant until so delivered. It was in his possession and under his control. He was required to put it in a deliverable condition and deliver it at a certain specified

Opinion of the court—BEAN, J.

place. Plaintiffs, who are grain merchants, were not dealing in or intending to purchase the grain until after it was harvested, sacked in good merchantable sacks, and delivered at their warehouse or platform; and were then only to pay for it at a certain rate per bushel after the quantity should be ascertained.

The contract is only a contract for the sale of a certain crop of grain; and if defendant has violated his agreement by delivering only a part of the grain and refusing to deliver the remainder, plaintiffs, if damaged, have their remedy, but not by an action to recover possession of the property.

A motion was filed in this court by respondents to strike the bill of exceptions from the files, because it is nothing but a copy in longhand of the reporter's notes of the trial. We are not aware of any rule of law or practice authorizing us to strike from the files that part of the transcript signed and allowed by the trial judge, and made a part of the record in the court below as a bill of exceptions; but we are equally certain that there is no rule of law requiring us to examine, in search of errors, such an alleged bill of exceptions, unless it is prepared in the manner provided by law. We have heretofore, in some instances, when it was difficult to clearly ascertain the question sought to be presented, declined to do so, and shall follow the same practice in the future when the occasion presents itself. If counsel prefer to encumber and confuse the record by bringing into this court a copy of the reporter's notes, containing all the proceedings of the trial to the minutest particulars, in place of a bill of exceptions clearly stating only the questions sought to be presented with so much of the evidence or other matter as is necessary to explain the exception and no more, they must abide the consequences. In this case, the only question we have thought proper to consider is the construction of the written contract between plaintiffs and defendant; and that question is clearly pre-

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sented by the bill of exceptions so as to be readily understood.

The judgment is reversed and a new trial ordered.

[Filed June 21, 1892.]

J. P. FINLEY, ASSIGNEE, v. ZOETH HOUSER.

JURISDICTION—JUDGMENTS AND DECREES—COLLATERAL ATTACK.—The judgment or decree of a court having jurisdiction to pronounce the same, is, in respect to the matter directly determined, or actually and necessarily included therein, conclusive upon the parties and those asserting subsequent claims under them, and cannot be collaterally attacked.

Umatilla county: M. D. CLIFFORD, Judge.

Plaintiff appeals. Affirmed.

This is an action of replevin to recover a stock of goods, wares, and merchandise.

After denying the material allegations of the complaint, the answer sets up a further defense as follows: That at all the times and dates mentioned in the complaint, defendant was the duly elected, qualified, and acting sheriff of Umatilla county, Oregon, and continued to be such sheriff until the first day of July, 1890; that on October 29, 1889, one C. A. Barrett, as the administrator of the estate of John P. Miller, deceased, commenced an action in the above court, and at said time duly filed his complaint therein against W. M. and Eva A. King for the recovery of the following described personal property, to wit: (Then follows a description of the property, which is the same that is in controversy in this action.)

The answer then alleges in substance that the plaintiff in said action claimed the immediate delivery of said personal property, and on the same day made the affidavit in such cases provided, for the claim and delivery of personal property, and delivered said affidavit to the defendant as sheriff, with an indorsement thereon directing and requiring

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the defendant as such sheriff to take such personal property from the possession of the defendants in said action, and deliver the same to the plaintiff therein; that at the same time he executed and delivered to the defendant a written undertaking, which was duly approved by this defendant as sheriff, and conditioned in all respects according to law in such cases, and then and there delivered said undertaking to this defendant as sheriff; that this defendant as such sheriff, by virtue of said process, and in obedience thereto, did, on the twenty-ninth day of October, 1889, take the said property from the said W. M. and Eva A. King, and on or about the — day of November, 1889, deliver the same to Nelson A. Miller, who was then and there the duly appointed, qualified, and acting receiver of said court in the suit in equity of C. A. Barrett, administrator of the estate of John P. Miller, deceased, against W. M. and Eva A. King, then pending in this court; that said receiver was appointed by said court for the purpose of taking charge and possession of said personal property; that the said receiver did thereupon take possession of said personal property; that at the time the defendant took possession of said personal property, the said C. A. Barrett, as administrator as aforesaid, was entitled to the immediate and exclusive possession thereof, and continued to be so entitled to the possession thereof until after the commencement of this action; and said W. M. King and Eva A. King, nor either of them, was at any time after October 29, 1889, nor any person claiming under them, entitled to the possession of said property nor any part thereof; that such proceedings were duly had in said suit in equity of C. A. Barrett as administrator of the estate of John P. Miller, deceased, against W. M. and Eva A. King; that on the twenty-fourth day of January, 1890, by agreement of the plaintiff and defendants in said suit, then and there in open court given, said plaintiff in said suit did obtain a decree directing, among other things, that the lien of the plaintiff upon said

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goods, wares, and merchandise be foreclosed, and said property sold by the sheriff of Umatilla county, Oregon, in the manner by law provided on foreclosure of mortgages; that on January 30, 1890, an execution was duly issued out of said court in said cause, under its seal, and directed to the defendant as sheriff, and that the defendant, by virtue of said writ, took possession of said property and sold it after duly advertising the same; that the property described in said decree is the same personal property described in the amended complaint herein; that the plaintiff, as well as W. M. and Eva A. King, and all persons claiming under them, after October 29, 1889, are estopped and precluded by said decree.

Another separate defense pleads the judgment in the action at law of C. A. Barrett, as administrator, against W. M. and Eva A. King, in which action the plaintiff prevailed and had judgment for the recovery of said property, as a bar against the plaintiff's claim in this action.

The reply to each of these separate defenses is the same in substance: The action was based on a mortgage given by W. M. and Eva King to Miller, who assigned the same to John P. Miller in his lifetime; that said personal property at the time the mortgage was given was part and parcel of a general stock of merchandise in a store, and owned and conducted by W. M. and Eva A. King, at Athena, Umatilla county, Oregon; and at the time said mortgage was executed, it was mutually agreed between the said W. M. and Eva King and said Miller that said Kings should remain in the exclusive possession of said stock of goods and sell and dispose of the same in the usual course of business, and that said Kings did thereafter remain in the exclusive possession of said stock of goods, and did sell and dispose of the same in due course of business; that by reason of said fraud, the mortgage was void and created no lien on said goods as against the creditors of said Kings; that by reason of said fraudulent mortgage, the judgment

Opinion of the court—STRAHAN, C. J.

based thereon was also fraudulent and void. In another part of the reply, like allegations are made seeking to attack the decree of foreclosure.

Paxton & Paddock, for Appellant.

W. F. Butcher, and *Chas. H. Carter*, for Respondent.

STRAHAN, C. J.—This is not a direct proceeding to annul or vacate the judgment and decree mentioned in the pleadings, but an attempt to attack them collaterally, and thus avoid their legal effect. It has been so often decided that this could not be done, that we deem it unnecessary to cite the authorities. *Morrill v. Morrill*, 20 Or. 96, is the latest expression in this court on the subject; see also the same case, 23 Am. St. Rep. 95, where it is carefully annotated and many of the cases cited.

The attack which the plaintiffs attempt to make on the mortgage amounts to nothing. It is the judgment as well as the decree which stands in his way. Both the judgment and decree necessarily affirmed the validity of the mortgage. The fact of its validity was actually and necessarily included in each of those adjudications, and was necessary thereto. (1 Hill's Code, § 736.) That fact, then, is just as conclusively settled as any other determined by the judgment and decree referred to. It is useless to attempt to illustrate a proposition so obvious, or to cite authorities to sustain it. The appellant seeks to avoid the force of these views by suggesting that he was not made a party to either the suit or action. The answer to that is, that he has not shown by his pleading that he had any interest at that time. The reply makes no such question; and if it did, as near as we can tell from this record, the action was pending at the time of said alleged assignment. If that is correct, then the appellant is bound by the judgment whether he was made a party or not. He is a *lis pendens* purchaser.

The decree appealed from must therefore be affirmed.

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[Filed June 21, 1892.]

J. P. BOWEN v. JOHN G. CLARKE ET AL.

JURY TRIAL—INSTRUCTIONS—ABSTRACT PROPOSITIONS OF LAW.—It is erroneous to instruct the jury on abstract propositions of law however correct they may be in theory.

LANDLORD AND TENANT—ABANDONMENT OF PREMISES—NEW TENANT—MEASURE OF DAMAGES.—When a tenant wrongfully abandons leased property, the landlord may re-enter the premises for the purpose of caring for the same without waiving his rights under the lease; and he is not bound to find a new tenant for the property; but if he does rent the same to a new tenant, his measure of damages for a breach of the old lease is the difference between the rent under the old lease and the less amount he receives under the new one.

Baker county: M. D. CLIFFORD, Judge.

Plaintiff appeals. Reversed.

It appears from the complain. that on June 10, 1890, the defendants leased of the plaintiff a certain building situated in Baker City, Oregon, for the term of three years, for which they agreed to pay one hundred dollars per month, payable on the first day of each month during the continuance of the lease; that defendants entered into the possession of said premises, and continued to occupy the same under said lease, and paid the rent therefor until the thirty-first day of January, 1891, at which time the defendants abandoned said premises, and thereafter refused to pay the rent or any part thereof agreed in said lease to be paid. The action is for the recovery of the rent for the months of February, March, and April, 1891.

The answer admits the leasing, and the non-payment of the rent; but alleges that on the thirty-first day of January, 1891, said lease was cancelled and surrendered, and that on said day the plaintiff entered into and took the actual possession of said premises, and received the keys thereof, by and through the mutual understanding and agreement of the respective parties thereto, that said lease was cancelled, surrendered, void, and of no effect; and that in pursuance of said agreement the plaintiff has been at

22	566
25	597
30*	430
37*	76
22	566
28	363
22	566
35	418

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all times since and is now in the actual and exclusive possession of said premises, and at all of said times has been offering the same to rent to other parties.

The reply denied the new matter contained in the answer. The jury returned a verdict for the plaintiff in the sum of one dollar, upon which judgment was entered, and from which the plaintiff has brought this appeal. The questions argued here arise entirely on the exceptions taken to the instructions given upon the trial, which are stated at large in the opinion.

Williams & Smith, for Appellant.

Hyde, Johns & Olmstead, for Respondents.

STRAHAN, C. J.—There was but one witness introduced upon the trial, and that was the plaintiff. The lease was also read. The court gave the jury the following instructions: "If you find from the evidence in this action that the defendants or their agents delivered the keys to the plaintiff, and surrendered up the premises to the plaintiff, with the understanding and agreement that the lease should become terminated, and the plaintiff took possession of the premises with that understanding and agreement, then I instruct you that you must find for the defendants. But you must find, gentlemen of the jury, from the evidence that these keys were surrendered up by the defendants themselves, or by some one authorized by them to act as their agents." This instruction was excepted to, and presents the first question on this appeal. The appellant's point of exception is, not that this instruction is not good law, but that it is wholly inapplicable to the facts appearing in evidence. The appellant concedes that as an abstract proposition of law the instruction is sound, but his contention is, that there was no evidence whatever before the jury upon which such an instruction could be based. On the contrary, the only evidence before the jury upon the question of the intent with which the plaintiff received the

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keys, is just the reverse of what is assumed by the instruction.

The same is true as to the alleged understanding and agreement that the lease should become terminated, as well as the surrender of the premises to the plaintiff. The defendants removed from said premises without the plaintiff's knowledge or consent, and then sent him the keys by one Pringle, which the plaintiff received for the purpose of caring for the building, at the same time informing Pringle that he would hold the defendants for the rent, and the keys subject to their order. There was, therefore, no fact in evidence before the jury upon which this instruction could have been predicated.

We have several times held that abstract propositions of law, however correct in themselves, are necessarily misleading and mischievous. They tend to draw the minds of the jurors away from the real facts in the case to something which they assume to exist, but which cannot be found in the record. (*Morris v. Perkins*, 6 Or. 350; *Hayden v. Long*, 8 Or. 244; *Marx v. Schwartz*, 14 Or. 177; *Breon v. Hinkle*, 14 Or. 494; *Glenn v. Savage*, 14 Or. 567; *Langford v. Jones*, 18 Or. 307; *Woodward v. O. R. & N. Co.* 18 Or. 289; *Bailey v. Davis*, 19 Or. 217; *Rowland v. McCown*, 20 Or. 538; *Knathla v. O. S. L. R. R. Co.* 21 Or. 136.)

The court also gave the jury the following instruction, to which an exception was duly taken: "If the plaintiff did take possession of said premises, and has tried to rent the same to other parties, I instruct you that this is evidence that tends to show that the lease was surrendered up and canceled by the consent of the parties thereto, but of itself is not sufficient to constitute a surrender." What the court meant by this instruction, when considered in the light of the evidence, is not quite apparent. It appeared upon the trial that plaintiff received the keys from Pringle, and entered into the possession of said property for the purpose of caring for it; but it is going too far to say that this is

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evidence that tends to show that the lease was surrendered up and canceled by the consent of the parties thereto. It is but a circumstance, and taken in connection with other facts which could readily be imagined, might be entirely controlling on the question of surrender; but the other facts nowhere appeared, which is probably the reason the court added that the fact mentioned in the instruction would not of itself be sufficient to constitute a surrender.

In a civil action, where evidence is submitted which tends to prove a fact in controversy, a jury may find the fact from such evidence, if they think proper, and the court cannot deny them that right. It is therefore manifest that the court sought to attach entirely too much importance to the delivery of the keys of the building to the plaintiff and his attempt to re-let the premises. The legal effect of those acts depended very much with what intent the keys were delivered to the plaintiff, and with what intent, and for what purpose, he accepted the same. The defendants had abandoned the premises at that time, and no doubt were anxious to surrender the same, but they could not, without the plaintiff's consent, relieve themselves from liability under the lease; and the plaintiff's words at the time he received the keys are the only evidence in the case on that subject. He then expressly informed Mr. Pringle that he would not release the defendants, and that he would hold them for the rent, and that the keys were subject to their order.

The court gave this instruction to the jury: "If the lease was surrendered up and canceled by the parties with their mutual consent, then the plaintiff cannot recover in this action for any rent after such cancellation." The giving of this instruction was error for the same reasons presented in discussing the first exception. As an abstract proposition of law, it is correct, but there was no evidence whatever before the jury that would authorize it.

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The court also gave this instruction: "I instruct you that it is not necessary that the lease should actually be surrendered up and cancelled, but you may find this from the acts and the intentions of the parties, and their conduct in relation to the same." This instruction was misleading for the same reasons as the first and third, and also for another reason: it virtually invited the jury to enter the field of speculation, and to conjecture, if they could, some cause for annulling plaintiff's lease. There were no acts of the parties in evidence from which said conclusion could have been drawn, and there was no way that the intentions of the parties could be known, other than from what they did and said. Besides, the intentions of the party on one side would not have been enough. To constitute a surrender, both must have concurred in the act.

The court further instructed the jury as follows: "I instruct you that if you find from the evidence that the plaintiff did take possession and receive the keys, it was then the duty of the plaintiff to rent the building, if he had the opportunity to do so, and receive the rent and give the defendants credit for the amount received." Upon the argument in this court, counsel for respondent was unable to cite a single authority to sustain this instruction; and it is not apparent to us under the facts in the case how such a duty on the part of the landlord could originate. So far as appears, the defendants abandoned said premises wrongfully and without cause. The plaintiff, as a prudent landlord, was not bound to refuse to care for his premises, nor was he bound to accept another as his tenant who was not satisfactory to him. The defendants had every opportunity of thus protecting themselves before they abandoned the house, had they thought proper. They could not by their own wrong, in abandoning the premises, impose that duty on the plaintiff; or, if he refused to accept the keys, to take the chances of the serious deterioration of the prop-

erty by reason of its being neglected. He was the owner, and had the right to accept the keys for the purpose of caring for his property, without waiving his rights under the lease.

The court also gave to the jury this instruction: "I instruct you that if you should find that the lease was not terminated or cancelled, and the plaintiff took possession of the premises and received the keys, and that responsible parties made him a *bona fide* offer to rent the building, and that plaintiff refused to rent the building, then the plaintiff can only recover the difference between the rent stipulated in the lease and the amount for which the premises could have been rented." Much of what was said in relation to instruction five is also applicable here. If the plaintiff had accepted a new tenant, as the authorities seem to hold he might have done, without effecting a surrender of the premises, he was not bound to do so. (*Respini v. Porta*, 89 Cal. 464; 23 Am. St. Rep. 488.) Yet if he did re-let them, the measure of his recovery would be the difference between the two sums. (*Winant v. Hines*, 14 Daly, 187.) But there was manifestly no legal duty resting on the plaintiff to re-let the premises. He had the defendants as his tenants under a valid lease, and we know of no law that would enable them without the consent of the plaintiff, to repudiate their contract, and to exact a release from the plaintiff, and compel him to accept another tenant in their stead.

For the reasons indicated in this opinion, the judgment must be reversed, and a new trial ordered.

Statement of the case.

[Filed June 21, 1892.]

L. W. WALLACE v. S. B. BAISLEY.

COMPLAINT AND ANSWER—IMMATERIAL ISSUE—JUDGMENT ON PLEADINGS.—

Where the only issue in a case is raised by a denial, in the answer, of immaterial allegations in the complaint, without which a complete cause of action would remain, the plaintiff is entitled to a judgment on the pleadings, as a legal right which the court cannot refuse.

PLEADINGS—AMENDMENTS—DISCRETION OF COURT.—The allowance of amendments to pleadings and the terms thereof are wholly within the discretion of the trial courts; and their decisions on those questions will not be reviewed in this court except for an abuse of discretion to which an exception has been properly taken.

Baker county: M. D. CLIFFORD, Judge.

Defendant appeals. Affirmed.

This action was originally commenced in the name of I. R. Dawson, as plaintiff, but while it was pending, the plaintiff died, and the present plaintiff was substituted, having succeeded to Dawson's interest in the action. The complaint charges that at all times therein alleged, the defendants E. Silver and S. B. Baisley were partners under the firm name of E. Silver & Co. The complaint then charges that between the first day of April and the first day of November, 1890, I. Lang, E. Lang, L. Lang, and ——— Lang, who were then and are now partners under the firm name of Lang & Co., sold and delivered to the defendants, at their special instance and request, goods, wares, and merchandise, of the reasonable value in the aggregate of three thousand and eighty-five dollars and twelve cents. This was followed by other necessary allegations, and then various payments were alleged. The complaint contains several other counts, but each was in substance of the same tenor, varying as to time and amount. The defendant Baisley answered separately, but the only issue tendered by him was a denial that he and Silver were partners at the times charged in the complaint, or at any time. These denials were repeated as to each count. A jury was called,

22 572
23 310
30* 432
31* 740
22 572
26 518

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and the plaintiff having introduced his evidence rested his case. The bill of exceptions recites that the defendant S. B. Baisley was called as a witness to prove certain facts tending to show that a partnership did not exist between the defendants. This was objected to by the plaintiff, for the reason that the answer tendered no material issue, which objection was sustained by the court, to which an exception was taken. The defendant Baisley then asked for leave to amend his answer so as to deny all the material allegations of the complaint, which the court refused, but no exception was taken to this ruling of the court. Thereupon, under instructions by the court, the jury returned a verdict for the plaintiff for two thousand and eleven dollars and one cent, upon which judgment was duly entered, from which this appeal was taken.

G. O. Holman, L. M. Robinson, and J. L. Rand, for Appellant.

W. F. Butcher, for Respondent.

STRAHAN, C. J.—The exception to the court's ruling excluding Baisley's evidence in relation to the non-existence of the partnership, cannot be sustained. The answer, by not denying, admitted the sale and delivery of the goods to the defendants, as well as their value. The issue taken, therefore, on the allegation of partnership between Silver and Baisley at the time of the sale and delivery of the goods, was entirely immaterial. That allegation might have been stricken from the complaint, and a good cause of action would have remained. This stood confessed by the answer; and the question of partnership, no difference what view the jury might have taken of it, could not have affected or changed the result; the plaintiff would still have been entitled to recover on the pleadings as they stood. (*Whitwell v. Thomas*, 9 Cal. 499; *Hunter v. Martin*, 57 Cal. 365; *Wood v. Henry*, 40 N. Y. 124; *Loper v. Welch*, 3 Duer, 644; *Millard v. Thorn*, 56 N. Y. 402.)

Points decided.

These authorities also dispose of the other exception. The plaintiff's cause of action being admitted by the answer, the court could not have done otherwise than to direct a verdict for the plaintiff. There was nothing for the jury to find. Under the state of the pleadings, the plaintiff was entitled to a judgment as a legal right which the court could not have refused.

The defendant also suggested on the argument his right to amend, but that question is not before us, no exception having been taken to the ruling of the trial court. We have constantly encouraged the practice of allowing amendments liberally, so as to enable the parties while in court to have their differences settled and determined; but the allowance of such amendments, and on what terms, are wholly with the trial court, subject to review here in case such discretion is abused; but it would be going beyond all precedent to reverse the judgment of the court below for refusing to permit an amendment, when the proposed amendment was not made out and submitted to the court, and when no exception was taken to the court's ruling denying it.

The judgment appealed from must therefore be affirmed.

[Filed June 21, 1892.]

OREGON RAILWAY & NAVIGATION CO. v. E. R.
SWINBURNE ET AL.

WRITTEN INSTRUMENT—DATE—DELIVERY—INTENT OF PARTIES.—Unless there is something to indicate a different intention, a written instrument takes effect from its delivery, and not from its date; but where it appears from the language of the instrument that it was intended to cover a certain period, or to incur a certain liability, although anterior to its actual delivery, it will, when delivered, relate back and take effect according to its terms and the intention of the parties.

ACCOUNT STATED—PLEADING.—If a party to an action intends to rely upon a statement of account as conclusive of what is due from the opposite party, it must be pleaded as an account stated.

29 574
26 263
26 458
30* 322
37* 1030
38* 618

Opinion of the court—BEAN, J.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT.—Before parties can be bound by the acts or declarations of one professing to be their agent, his authority as such agent must be shown.

CONSTRUCTION OF BOND—RAILROADS—RIGHT OF WAY.—In an action on a bond conditioned for the payment to a railroad company of all reasonable sums of money by it paid out in securing a right of way, depot grounds, and terminal facilities for a line of railway between two points, it was held: (a) that the obligors are not liable for a certain sum in gross for the whole right of way, etc., but only for such several sums as are reasonable in each instance where it was necessary to expend them for that purpose; (b) that the award of the arbitrators in contested cases about the right of way, is competent evidence of the reasonableness of the amounts paid in those cases; and (c) that the bond does not indemnify the company for money expended in criminal prosecutions arising out of disputes about the right of way.

Morrow county: W. L. BRADSHAW, Judge.

Plaintiff appeals. Reversed.

Zera Snow, for Appellant.

A. S. Bennett, for Respondent.

BEAN, J.—This is an action brought by plaintiff against about eighty residents of Morrow county to recover a sum of money claimed to be due upon a bond, which was executed by the defendants to reimburse the plaintiff for moneys expended by it in procuring rights of way for the Heppner branch of plaintiff's railroad, from Willows Junction to Heppner. The bond is as follows:—

“Know all men by these presents: That we (here follows a list of the signatures to the bond), of the county of Morrow and state of Oregon, are held and firmly bound unto the Oregon Railway & Navigation Company, a private corporation organized and existing under the laws of the state of Oregon, in the penal sum of thirty thousand dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals this fourteenth day of April, 1888. The condition of the above obligation is such, that, whereas the Oregon Railway & Nav-

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igation Company has agreed to construct, equip, and have in operation on or prior to the first day of January, 1889, a branch line of railway, starting from some point on its main line on the Columbia river, at or near the mouth of Willow creek, in Oregon, and running to the town of Heppner, in Morrow county, via the town of Lexington, and to establish and maintain all necessary shipping facilities at the town of Lexington, the town of Heppner, and other convenient points along the line of said road; and, to that end, to procure lands for right of way, depot grounds, and terminal facilities along the line of said road, and to pay such sums as may be required for such purposes, and as shall be reasonable, on condition that the amount so expended shall be re-paid to it, the said company; now, therefore, if the said company shall, in all respects, build, equip, and maintain its said line of road with stations and shipping facilities within the time above specified, and do all acts requisite and necessary in the premises; and the parties of the first part shall, upon the performance of said undertaking, pay the said company, well and truly, or cause to be paid to the said company, all reasonable sums of money by it paid out in the matter of securing a right of way, depot grounds, and terminal facilities for said line of railway, these presents shall be void, otherwise to be and remain in full force and virtue."

The plaintiff, having complied with the conditions of the bond on its part, and paid out and expended, as it alleges, the reasonable sum of twenty-four thousand nine hundred and thirty-three dollars and seventy-two cents in securing lands for right of way, depot grounds, and terminal facilities, only seventeen thousand one hundred and four dollars and thirty cents of which has been repaid to it, brings this action to recover the balance of such expenditure. A trial before a jury resulted in a verdict and judgment in plaintiff's favor for the sum of one thousand and sixty-six dollars, from which it brings this appeal, assign-

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ing error in the admission and exclusion of testimony, and instructions to the jury. These assignments of error can be most conveniently considered in the order in which they are presented in the brief.

The bond upon which the suit is brought, seems to have been the result of negotiations between the plaintiff and the citizens of Heppner and vicinity, looking to the construction and operation of a branch railway line from its main line to that place. After various public meetings in Heppner, held for the purpose of considering the matter and devising ways and means to obtain a railroad from Heppner to the Columbia river, there to connect with plaintiff's road, at which meetings some of the defendants were present—but just who does not appear—it was finally understood that if the necessary land for right of way, depot grounds, and terminal facilities should be provided or paid for by the citizens, the plaintiff would construct the road; and to carry out this understanding, the bond was prepared and the signatures of defendants procured by various citizens of Heppner; but just the time of its execution and delivery is uncertain from the evidence, and may have been as late as "from two weeks to two months after its date"; but in the mean time, and while the signatures were being obtained, and pending delivery of the bond, preparations for the work of construction of the road had begun, and some rights of way obtained and paid for by plaintiff before the final delivery of the bond.

It is insisted by defendants, and was so held by the court below, that there is no liability on their part for any expenditure made by plaintiff in procuring rights of way, depot grounds, or terminal facilities prior to its actual delivery of the bond, although paid out and expended by plaintiff after its agreement or understanding with the citizens of Heppner and after the date of the bond.

Unless there is something to indicate a different intention, a deed or instrument in writing speaks and takes effect

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from the date of delivery, and not from its date; but where it appears from the language of the instrument that it was intended to cover a certain period or incur a certain liability, although anterior to its actual delivery, it will, when delivered, relate back and take effect in accordance with its terms and the intention of the parties. (*Alma Life Ins. Co. v. American Surety Co.* 34 Fed. Rep. 291; *Dawes v. Edes*, 13 Mass. 177; *Hatch v. Attleborough*, 97 Mass. 533.)

By the bond in this case, defendants agreed, if the plaintiff should comply with the terms of the bond on its part, to pay, or cause to be paid to it, "all reasonable sums of money by it paid out in the matter of securing a right of way, depot grounds, and terminal facilities" for the road from Willow to Heppner. The manifest effect of this stipulation or provision, when construed in the light of the circumstances surrounding the execution of the bond, the object to be accomplished, and the evident design and intention of the parties, is to make the defendants liable for a reasonable sum paid out by plaintiff in procuring the right of way, depot and terminal grounds after the date of the bond, whether before or after its formal delivery. By the terms of the contract, plaintiff was to construct and build a branch line of road from a point intersecting its main line at Willows to the town of Heppner, and defendants were to defray all reasonable expenses attached to the procurement of the right of way, depot grounds, and terminal facilities for such line; and as an obligation on their part to do so, the bond was executed. When, therefore, the bond was delivered, it related back and covered such expenditures within its terms as were made after its date, although before the formal delivery. We think, therefore, the court erred in holding that defendants were only liable for expenditures made after the formal delivery of the bond.

Plaintiff claims that the court erred in ruling and holding that the measure of defendants' liability under the bond is the reasonable sum paid for each particular right

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of way, and not a reasonable amount in gross for the entire right of way. This, it seems to us, is the proper construction of the bond, and the true measure of defendants' liability. The conditions of the bond are not for the payment of a gross sum, which shall be reasonable for the entire right of way, but the repayment to plaintiff of such sums as it shall be required to pay for that purpose, and as shall be reasonable. It is not an agreement on behalf of defendants to pay plaintiff the reasonable value of a right of way, depot grounds, and terminal facilities, but is a contract of indemnity, and an agreement to repay to plaintiff such reasonable sums as it may be required to expend for that purpose. The defendants are, therefore, only liable for such sums as plaintiff was required to expend for the purpose specified, and then only in the amount that may be reasonable in each particular instance.

The contract between plaintiff and Penland, Bishop, Morrow, and Cunningham was not competent evidence in the case. It was an independent contract between plaintiff and those parties; and although they may have procured the bond in suit to be executed and delivered in pursuance of the agreement, the defendants' liability is measured by the terms of the bond, and not the preliminary agreement. Nor was it competent evidence as one of the surrounding circumstances in the light of which the bond is to be construed; for it does not appear that defendants knew at the time the bond was executed of the existence of the agreement, or that it was being executed in pursuance of any such an agreement.

In two or three instances the defendants claimed that the amounts paid by plaintiff were unreasonable. To rebut this claim, plaintiff offered to show that the prices paid by it were fixed by arbitration between the land owners and the company, but the court refused to admit such evidence. By the agreement between the plaintiff and defendants, plaintiff was to obtain and pay for the right of way in the

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first instance, and defendants were to reimburse it for all reasonable sums so paid for that purpose. By their agreement, the defendants must be considered to have impliedly consented that plaintiff might resort to the means usually employed in such cases, in determining the amount to be paid for rights of way; and if in so doing, a *bona fide* dispute between it and a land owner was in good faith submitted to arbitration, the award of the arbitrators was, we think, competent evidence on the question of the reasonableness of the amount paid by plaintiff.

There was no error in ruling and holding, under the pleadings in this case, that the account offered and received in evidence in behalf of plaintiff, did not have the effect of an account stated. There was no stated account pleaded, but the plaintiff in its pleadings relies upon the liability of defendants under the terms of the bond. In order to become available as a stated account, it must be so pleaded. (*Bump v. Cooper*, 20 Or. 527.)

Plaintiff sought to charge the defendants with six hundred dollars paid one Keithley for property in Heppner, not used by it as a right of way, or for depot grounds, or terminal facilities, and also for three hundred dollars expenses incurred by it in criminal proceedings growing out of a controversy with some land owner along the road, but the court held that neither of these amounts was properly chargeable against the defendants. This was manifestly correct. Defendants were under no obligations to pay for property purchased by plaintiff unless necessary for right of way, depot grounds, or terminal facilities, nor did they agree to reimburse plaintiff for expenses incurred in criminal proceedings. If it undertook to go across premises without procuring a right of way, or the owner's consent, and thereby involved itself and employes in criminal proceedings, and the costs and expenses incident thereto, it did so on its own responsibilities, and cannot hold these defendants liable for the expenses so incurred.

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One George Harrington, appointed at some public meeting in Heppner, coöperated with the right of way agent of plaintiff in purchasing and securing rights of way, but there is no evidence to show that he was employed by or acting for these defendants with their knowledge or consent; and, therefore, they are not bound by his acts or agreements; and although he may have consented and agreed to the amounts paid for rights of way, his acts are not competent evidence against these defendants.

The judgment is reversed, and a new trial ordered.

[Filed June 21, 1892.]**N. H. HOWARD v. P. R. CONDE.**

CONVERSION OF PROPERTY—EXECUTION—JUSTIFICATION OF SHERIFF—DEFENDANT IN WRIT.—In an action for the conversion of personal property, when the defendant attempts to justify as a sheriff levying on the property as that of a third party, his answer, to be sufficient, must allege that the property taken belonged to the defendant in the execution.

VERDICT OF SHERIFF'S JURY—INDEMNIFYING BOND—CUMULATIVE REMEDY.—The remedy of the claimant of personal property, on a bond indemnifying a sheriff for selling the property on execution notwithstanding the verdict of a sheriff's jury, is cumulative, and does not take away the claimant's right of action for the wrongful seizure of his property.

Baker county: M. D. CLIFFORD, Judge.

Defendant appeals. Affirmed.

The complaint in this case is in substance as follows: That on the seventeenth day of August, 1891, at Baker county, state of Oregon, the plaintiff was owner, and ever since has been entitled to the possession as owner, of a certain milch cow, of the value of thirty dollars; of a certain account due her for board from J. H. Agee, of the value of fifteen dollars; of a certain account due her for board from W. R. Grimes, of the value of five dollars; of a certain account due her for board from Jay Stillwell, of the value of twenty-four dollars; of a certain account due her for

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board from one John Wright, of the value of forty dollars; of a certain account for board due her from F. M. Vernon, of the value of twenty dollars; of a certain account due her for board from one W. Lindsey, of the value of ten dollars; of a certain account due her from one R. H. Simons, of the value of two dollars and fifty cents; and of an account due her for board from one H. H. Stratton, of the value of twenty-five dollars; that the aggregate value of said cow and accounts was upon said day the sum of two hundred and eighteen dollars and seventy-five cents; that on the seventeenth day of August, the said defendant, in Baker county, Oregon, wrongfully took said cow from the possession of the plaintiff, and did wrongfully take possession of the said sums of money and accounts due her as aforesaid; that on the eighteenth day of August, 1891, at said county and state, the plaintiff demanded possession of all the said property from the defendant, but that the defendant refused to deliver any part of the same to plaintiff, and did on and between said date and the eleventh day of November, 1891, wrongfully sell said cow, and did wrongfully collect all of said accounts aforesaid due to the plaintiff, and convert the proceeds of said sale and the amounts due plaintiff on said account to his, the defendant's, own use; that thereby the plaintiff was and is damaged in the sum of two hundred and eighteen dollars and seventy-five cents. Wherefore, the plaintiff demands judgment against the defendant for the sum of two hundred and eighteen dollars and seventy-five cents, and for the costs and disbursements of this action.

After denying each material allegation of the complaint, the answer contains the following further and separate defense: "That at all the times and dates mentioned in plaintiff's complaint, and for a long time prior thereto, defendant was and still is the duly qualified and acting sheriff of Baker county, Oregon; that on the twelfth day of August, 1891, this defendant, as sheriff aforesaid, duly

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and regularly received an execution issued out of the circuit court of the state of Oregon for the county of Baker, commanding this defendant, as said sheriff, that out of the property of one E. G. Howard, the defendant in said writ, he make the sum of three hundred and eighty-two dollars and ninety-four cents with certain costs and disbursements; that said execution was regular on its face, and in every way regular and mandatory upon this defendant, a copy of which execution is hereunto annexed and marked 'Exhibit A'; that thereafter, and by virtue of said execution, this defendant as sheriff, levied upon and sold the said cow in the plaintiff's complaint set forth as the property of the said E. G. Howard, the defendant in the said execution; and did, also, as sheriff aforesaid, duly and regularly garnishee J. H. Agee for the sum of fifteen dollars, due from said Agee to said E. G. Howard, defendant in said writ, and that said Agee, on the seventeenth day of August, 1891, duly answered said garnishee process, that he owed the said E. G. Brown five dollars; that by virtue of said execution aforesaid, defendant as sheriff aforesaid, duly garnisheed W. R. Grimes as a debtor owing said E. G. Howard, and that said W. R. Grimes duly answered that he was indebted to said E. G. Howard in the sum of five dollars; that by virtue of said execution aforesaid, this defendant, as sheriff aforesaid, duly garnisheed D. B. Lyons, and that said D. B. Lyons duly answered said garnishee process that he was owing the said E. G. Howard the sum of ten dollars."

The answer then sets up a number of other like garnishments, the aggregate amount of which is one hundred and thirty-one dollars and eighty cents, and then proceeds: "That all said persons above named under and by virtue of said garnishee proceedings, voluntarily paid to this defendant as sheriff the respective sums above set forth, the same being money due and owing said E. G. Howard, and not otherwise; and the above named are respectively the identical persons and amounts mentioned and set forth

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in plaintiff's complaint, all of which said sums and amounts this defendant, as sheriff as aforesaid, by virtue of his writ aforesaid, duly returned with said writ, and that the whole thereof was paid over to the plaintiffs in said writ, and that the above are the facts and doings of which the plaintiff complains in this action.

"For another and separate defense, the defendant alleges that on the eighteenth day of August, 1891, and after all of said garnishee proceedings were had, the plaintiff gave notice in writing that she claimed the cow levied upon, as well as the sums severally garnisheed; that thereafter such proceedings were had by virtue of said execution and notice that a sheriff's jury was duly empaneled in the regular way to try the validity of such claims respecting the said cow and accounts; and upon the trial thereof, a verdict was rendered for the said claimant for the said cow, and for certain of the accounts set forth in plaintiff's complaint, aggregating seventy-two dollars and fifty cents, and not more." The answer further alleges that after the rendition of said verdict, the plaintiffs in the execution duly made and executed their undertaking in all things sufficient, and tendered the same to this defendant, as by law in such case made and provided, the said undertaking being in writing, with two sufficient sureties, residents and householders of the state of Oregon, wherein and whereby they undertook to indemnify the plaintiff herein against all damages, costs, and disbursements by virtue of the sale and disposal of said property under and by virtue of said execution, which undertaking was duly returned by the defendant with said execution, and that the same is now and has been ever since the eleventh day of November, 1891, the property of the plaintiff, and for her sole use and benefit.

The plaintiff demurred to each of the separate defenses, which demurrer was sustained by the court. A trial resulted in a verdict for the plaintiff in the sum of two hundred and eighteen dollars and seventy-five cents, upon which judg-

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ment was duly entered, from which the defendant appeals.

M. L. Olmstead, and *H. E. Courtney*, for Appellant.

R. S. Anderson, and *C. W. Manville*, for Respondent.

STRAHAN, C. J.—The only error complained of on this appeal is the ruling of the court below sustaining the demurrer to the new matter in the defendant's answer; and to that our attention will be directed.

The first separate defense is open to criticism, but it is not wholly without merit. It fails to allege that the cow levied upon was at the time of the levy the property of E. G. Howard, and for that reason the attempted justification as to the cow fails. Whether the garnishment by the sheriff of persons whom the plaintiff alleges were indebted to her, and the payment by them to the sheriff of the sums which they respectively admitted to be due and owing to the defendant in the execution, is any injury to the rights of the plaintiff, we need not now consider or decide, because both parties on this trial have assumed that if those persons were in fact indebted to the plaintiff in this action, she would be entitled to recover the sums they paid the sheriff, and which were applied on the execution in his hands. Upon this part of the defense the sheriff tenders an issue that these persons were indebted to E. G. Howard, the defendant in the execution; and if the parties wish to try out the right to the money in that way, it is not for the court to interfere. The first separate defense was therefore insufficient.

The other defense pleaded relates to the effect of the verdict given by a sheriff's jury, and the execution of the undertaking provided by the code. By the verdict, only a part of the property claimed, to the value of seventy-two dollars and fifty cents, was found to be the property of the claimant; but the verdict in no manner identifies what particular property belonged to the claimant. Whether the defendant, in the execution, was found by the jury to

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be the owner of the residue, we are not informed by the record before us; but whether he was or not, may not be very material in view of other matters stated in the second separate defense. The plaintiff, in the execution, desired to sell the property notwithstanding the verdict, and accordingly gave the undertaking required by section 289, Hill's Code. That section makes it the duty of the sheriff, notwithstanding the verdict, to proceed to sell the property seized, in satisfaction of the execution, if the plaintiff tender to him a written undertaking, executed by two or more good and sufficient sureties, residents of the state, and householders or freeholders therein, in double the value of the property, to the effect that he will indemnify the sheriff against all damages and costs which he may sustain in consequence of the seizure and sale of such property; and, moreover, that he will pay to the claimant of such property all damages which he may sustain in consequence of such seizure and sale. This statutory undertaking evidently has a two-fold purpose—to indemnify (1) the sheriff, and (2) the claimant; but the statute has not provided that the execution and return of the bond shall take away a claimant's right of action for the wrongful seizure of his property. Therefore, we think that so far as the claimant is concerned, the remedy on the undertaking must be regarded as cumulative. The common law right to sue for a wrong done to one's property, is not taken away by the execution of the undertaking, unless the statute expressly so provides. This was the rule adopted in *Belkin v. Hill*, 53 Mo. 492, under a statute very similar to ours in this respect. And this construction was followed in *State ex rel. v. McBride*, 81 Mo. 349. It was there held that, in the absence of statutory prohibition, the claimant of property levied upon by a sheriff, and as to which an indemnifying bond has been given the officer, is not restricted to his remedy on the bond, but may sue the sheriff for the trespass or conversion. The condition of the statutory

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undertaking seems to imply as much. There is a provision in the undertaking for the indemnity of the sheriff. If he cannot be sued, and is not liable for taking the property of a stranger to his writ and applying it thereon, against what claim or damages is he indemnified? The sheriff's right to indemnity under the bond only arises after he has paid the true owner the damages sustained for the wrongful levy. Until the sheriff has been compelled to pay damages on account of his official acts, which are entirely for the benefit of the plaintiff in the writ, he has sustained no injury, and therefore could have no cause of action.

Whether the person whose property has been unlawfully taken might sue directly on the undertaking, it is not necessary now to decide, as that case is not before us. If the sheriff is not liable to the true owner of the property when he wrongfully takes it and applies it to the payment of another's liability, the clause in the undertaking in the sheriff's favor would never be of any utility. No one could ever declare on that clause of the bond except the sheriff, and he only after he had been compelled to pay damages to the true owner for the wrongful taking. In some of the states the sheriff is expressly exempted from liability by positive law in such case, but we have no such statute here.

In this view of the law, the court below did not err in sustaining the demurrer to the second separate defense. There being no other errors complained of, the judgment appealed from must be affirmed.

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[Filed June 21, 1892.]

RACHEL CRABILL v. L. CRABILL.

JURISDICTION—PARTIES AND SUBJECT MATTER—VALIDITY OF DECREE—A judgment, or decree, rendered by a court having jurisdiction of the parties and of the subject matter, although erroneous, is not void, but, at best, is only voidable; and is conclusive on the parties until reversed by some direct proceeding.

Baker county: M. D. CLIFFORD, Judge.

Plaintiff appeals. Affirmed.

M. L. Olmstead, and *H. E. Courtney*, for Appellant.

C. A. Johns, for Respondent.

LORD, J.—This was a suit brought by the plaintiff against the defendant for a divorce, on the ground of desertion and adultery. The defendant demurred, which being overruled, he answered denying all the material allegations, and set up as a further and separate defense that the plaintiff and defendant were already divorced by a decree of the circuit court of Umatilla county, and attaching a copy of the complaint, of the demurrer filed therein, a copy of the findings of the referee, and a copy of the decree rendered on the same, all duly certified, etc., and alleging that the report of the referee therein was, on motion of the plaintiff, by her then attorney of record, in all things and respects confirmed, and that the said circuit court of Umatilla county then had jurisdiction of the parties to the said suit, and of the subject matter thereof, and asking for a decree for costs and disbursements in the present suit. To this further and separate defense the plaintiff demurred, on the ground that it did not state facts sufficient to constitute any cause of defense to the plaintiff's suit, which the court overruled. As the plaintiff refused to proceed further, a decree was rendered for costs and disbursements in favor of the defendant. Was the overruling of the demurrer error?

22	588
135	88
135	119
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48	528

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The contention for the appellant is, that the complaint in the former suit did not state a cause of suit, and, therefore, the decree founded upon it is null and void. It is always important to discriminate between judgments or decrees that are void and those that are merely voidable. A void judgment or decree is never binding, and may be disregarded and treated as a nullity; but a judgment or decree which is merely voidable, is binding upon the parties until reversed by some direct proceeding. There can be no doubt that the circuit court of Umatilla county is invested with jurisdiction to try and determine proceedings in divorce when the parties are properly before it. The dissolution of the marriage contract, or the granting of a divorce, is a subject matter of which the circuit courts of the state have original and exclusive jurisdiction.

The record discloses that the defendant in the former suit appeared and filed a demurrer, which was overruled, and that the state was represented by the district attorney; that the cause was referred to a referee to take the testimony, and to report the same with his findings to the court; that thereafter the referee made his findings upon the testimony and reported the same to the court, which was confirmed by the court on motion of the plaintiff, and a decree for a divorce granted to her. The court, therefore, had jurisdiction of the parties and of the subject matter of the suit; and the decree which it rendered was within the jurisdiction conferred on it by law. Such being the case, the rule of law is well settled that when a judgment or decree is rendered by a court thus invested with jurisdiction of the parties and subject matter, although the judgment or decree rendered therein may be erroneous, it is obligatory until reversed. Such a decree cannot be treated as a nullity merely because it was improvidently made, or in a manner not warranted by law. Whether we should have regarded it as our duty to reverse the decree upon the ground of the insufficiency of the facts to consti-

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tute a cause of suit, as now urged, had it been brought before us on appeal, is not the question, as that decree was rendered by a court of competent jurisdiction, having jurisdiction of the parties and of the subject matter of the suit.

In such case, it makes no difference how egregious the error committed by the court in exercising its jurisdiction, its decision is valid and conclusive on the parties until reversed. The case is peculiar. The plaintiff in the former suit and the defendant therein are the identical plaintiff and defendant in the present suit. In the former, as in the present suit, a divorce was sought. Upon her petition a divorce was granted to her, and she now petitions the same judge who rendered the former decree for another decree of divorce, and utterly ignores the former decree. There is no complaint or allegation of mistake, or fraud, or collusion. It is not a case of collateral attack upon the former decree, but an attempt to treat it as a nullity to secure—as it would seem by the present suit for divorce—support and alimony in addition thereto. But this is not the proper method to get rid of that decree. If the plaintiff was dissatisfied with the former decree by reason of any mistake or inadvertence, she could have found a remedy to correct it or vacate it under section 102, Hill's Code, on a proper showing; or, if there was any fraud or collusion practiced upon her when the decree was procured, she could have resorted to equity to set it aside, and obtained her just rights in the premises. As was said by BEAN, J., in *Morrill v. Morrill*, 20 Or. 106; 23 Am. St. Rep. 101: "Beyond the methods provided by statute, courts possess inherent powers, to an almost unlimited extent, to redress wrongs by modifying or setting aside judgments obtained by fraud or mistake. But these methods must be resorted to. They give no countenance to the idea that a judgment wrongfully obtained may be completely ignored." As there is no pretense in the pleadings of any fraud or mistake, the

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decree in the former suit operates as an estoppel against the plaintiff in the present suit. (*Berry v. King*, 15 Or. 165.) As the court below in the former suit had jurisdiction of the parties and of the subject matter, it is of no consequence whether or not the complaint was vulnerable to demurrer, or how egregious the error the court may have committed in the exercise of its jurisdiction, its decision is valid and binding on the parties.

There was no error in overruling the demurrer, and the decree is affirmed.

[Filed June 21, 1892.]

STATE OF OREGON v. FRED ZORN.

CRIMINAL LAW—INSANITY.—In criminal actions, if it appear from the evidence, to the satisfaction of the jury, beyond a reasonable doubt, that at the time of the commission of the criminal act charged in the indictment, the defendant was laboring under such a defect of reason, from disease of his mind, as not to know the nature, quality, or consequences of the act he was committing, and was unable at the time to distinguish between right and wrong, he is entitled to be acquitted on the ground of insanity.

IDEM—DRUNKENNESS—MOTIVE AND INTENT.—Drunkenness of the defendant in a criminal action does not excuse him, but may be considered by the jury in determining the purpose, motive, or intent with which he committed the criminal act charged against him.

Umatilla county: M. D. CLIFFORD, Judge.

Defendant appeals. Affirmed.

J. C. Leasure, for Appellant.

George E. Chamberlain, attorney-general, for Respondent.

LORD, J.—The defendant was indicted, tried, and convicted of the crime of murder in the first degree, in shooting and killing his wife, Caroline Zorn. A motion for a new trial was filed, but overruled by the court, and the defendant was sentenced to be hanged. There are several assignments of error in the notice of appeal, but those relied upon for a reversal of the judgment relate wholly to

22	591
24	72
30*	317
32*	1085

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185	417

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instructions excepted to as given by the court, and instructions asked by the defendant and refused by the court.

Before, however, proceeding to the consideration of these assignments of error, there is a preliminary matter, as regards practice, of considerable importance, which needs to be adverted to. The bill of exceptions discloses affirmatively that no objections were made or exceptions taken to any portion of the charge given by the court to the jury until after the verdict was returned into court, and that then, for the first time, counsel for the defendant asked permission to except to the charge, which the court allowed. It has been the uniform practice of this court to require that exceptions to instructions should be taken at the time of the trial, in order that the judge may have the opportunity, before the jury retires, to correct any error into which he may have fallen. To allow a party to take his chances upon a verdict on instructions given, without exception, and afterward, when the verdict is adverse to him, to challenge the correctness of such instructions, would needlessly multiply new trials and reversals. Had he made his objection, or taken his exception at the time such instructions were given, the court might have instructed the jury differently or obviated the objection. This court, in *State v. Dodson*, 4 Or. 67, adopts the language of the supreme court of California, in *Morgan v. Hugg*, 5 Cal. 409, and holds that "errors cannot be relied on in the appellate court which are not taken advantage of and raised at the trial." Any other rule, we think, would be extremely inconvenient and seriously obstruct the administration of justice. It seems, however, that the instructions asked by the defendant and refused by the court involve substantially the same questions as are raised by the instructions given by the court on its own motion, and excepted to, or to which the court permitted the defendant to note his exceptions after verdict. It was evidently for this reason, and to enable us to determine whether any injustice was done the defendant by the

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instructions given, that the court allowed the exceptions, and certified the same to us, as if they were regularly taken. It is in view of these considerations, and the sacredness of life, that we proceed to their examination.

The instructions asked for and refused were directed to covering two grounds of defense, namely, insanity, as the result of delirium tremens; and drunkenness, as affecting the intent of the defendant in committing the act. If the instructions given by the court, to which exceptions were allowed, covered these points, and instructed the jury correctly as to the law, there was no error. It appears from the testimony that immediately prior to the shooting of his wife, the defendant had been at Walla Walla, a few miles distant from his home, for some two weeks, drinking much of the time to excess; that on the evening prior to the day when he shot his wife, he was seen by a member of the police force, who testifies that he was pretty well intoxicated, very nervous, and seemed to be "off his base," although the circumstances detailed and the conversation that occurred do not indicate any marked peculiarities of conversation or conduct other than would be likely to take place with any one in his condition. This officer says: "I knew he was drinking, and he seemed to be off his base, and he repeated the same question to me and I tried to change the conversation, and said, 'are you going home to-night?' He acted rather strange, and started a conversation about his family, and said he felt good, and that this would be the last drunk; that he was going back to his wife. He turned, after I left him on the corner, and went down the street; there was a German lodging-house down there, and I asked him, 'aint you going home to-night?' and he said, 'yes.'"

Instead of going to bed, he evidently walked home, as the testimony of his step-son is to the effect that he was at his own home at an early hour in the morning, rapping at his window and asking to be let in; that he went into his wife's room and remained there some time; that he ate

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breakfast and dinner, and remained about the house during the day. Up to this time there is no evidence of any disturbance, or quarreling between the defendant and any member of his family. In the evening, at half-past five or six o'clock, his step-son, who was about seventeen years of age, testifies that he was in the yard, when he heard three shots, and shortly thereafter, his mother, Caroline Zorn, came out of the house, "in the yard, and right by the header she fell down"; that his grandmother and two little sisters led her back to the house; "they led her in; she fell down three or four times going in"; that he went for Mr. Richey, the sheriff, and the doctor; that his mother was shot in the breast and the back, and that his grandmother was shot in the left shoulder. There is no testimony in regard to the defendant's shooting his wife, or the circumstances under which the shooting was done, except the oral admissions of the defendant. Mr. Richey testifies in substance that when he reached the house he found the old woman in the kitchen, lying by the stove; that Mrs. Zorn was in a bedroom, and that Mr. Zorn was in bed in the front room, and his white shirt and coat and pants laid on the lounge, and his shoes were under the stand; that his face was covered with blood, and one pillow was blood all over. This witness says: "I had a pair of handcuffs with me; I slipped a handcuff onto one of his hands, when he said, 'don't put that on, I am shot.' I said, 'where are you shot?' and he said, 'in the mouth.' I asked him who done it, and he said he done it. I asked him who shot the women, and he said he did. I asked him how many times he shot his wife, and he said 'twice in the back,' but I found out afterwards he made a mistake; he shot her once in the back and once in the breast. He told me that he fired two shots at his wife and one at the old lady. When asked what he done the shooting for, he stated he went in the room there, and that they would not let him in, and he kicked the door open and shot them."

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Sheriff McFarland testifies: "I asked him what he had done the shooting for; and he said they would not let him in, was the reply he made; and then he went on and told me the position he was in when he shot himself." Another witness says: "He just said he kicked the door in and shot them, and went and laid himself down in the bed, and he heard some one hollo outside, and he thought some one had come to take him, or shoot him, and he placed the revolver in his mouth and shot himself."

There are several other witnesses who were present upon the evening of the shooting after it occurred, who conversed with him in respect to it, before his wife, the old lady, and himself were carried to the hospital at Walla Walla, and all substantially agree to the same statement. Another witness who had a conversation with him afterward at Walla Walla testifies: "He told me that Friday—that was October 2d, I believe,—he saw his wife in Walla Walla, and he wanted her to take him out home with her, and she was to meet him but failed to do so; so he started to walk out there Saturday morning, and got there about breakfast time, and he took breakfast and went into the bedroom, and his wife went with him; and afterwards she went out, and he got up and had dinner, and stayed around until afternoon; and he wanted her to bring him back to town, and she refused to do it; and she went into the house and shut the door in his face, and that made him mad, and he broke the door in, and she said she would make him suffer for it, and he pulled his pistol out and shot her, and she ran out and her mother ran out, and he shot her, and then he went in and laid down in bed, and got to thinking about it, and concluded to kill himself, and he put the pistol to his mouth and pulled the trigger. That is about all he said."

The testimony of a number of the witnesses who were well acquainted with the defendant, and who saw him after the shooting of his wife, is to the effect that the defendant

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seemed as rational as ever. Mr. Richey testifies: "He seemed to be just about like he always did, except his face was all blood. After the doctor cleaned him up he was natural." Doctor Keeler testifies that the defendant was "perfectly rational and normal in all respects, as far as I could see. I would state, however, from the odor of the man's breath I was under the impression he had been drinking. He was not intoxicated at the time." Sheriff McFarland testifies: "Well, the man appeared to be perfectly rational when he was talking to me. I sat down opposite the bed and gave him a sip of water, and after he got the blood out of his mouth I think he talked as rational as he ever did talk." The testimony of the stepson, who let the defendant into the house on the morning of his return from Walla Walla, and who saw him around through the day, does not indicate that the defendant was intoxicated. There was also some evidence to the effect that about a month prior to the shooting, the defendant had made some threats to take the life of his wife. "Q.—State how the matter came up, and what you heard him say? A.—It was in regard to their business affairs. She had bought out his interest; he talked several times during harvest; he would talk the matter over; and when he would get to studying about it he would get very mad about it, and he said he would go over there and kill the last damned one of them, or he had a mind to kill them. Two different times this was brought up while he was at work for me." The witness then relates another conversation he had with the defendant after the shooting and death of his wife and while he was in jail. He was relating to defendant in that conversation about getting the bullet out of his wife, and that she never spoke after that; that she only took the bullet in her hand and turned it over. By the court: "Go ahead and state what was said. A.—He said she ought not to have bothered him; to have let him go to bed and he would not have done it." Witness further testifies to

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trouble between defendant and deceased on several occasions when they would come for him to go over. J. S. Warren testifies to having had a conversation with defendant in August or September in which he mentioned his wife's name. Witness was asked in this connection: "Q.—State to the jury what it was. A.—He went on to tell about his wife owing him, and if he was not paid he would go over there and kill the whole outfit. Q.—Did he make these statements more than once? A.—Yes, sir. Q.—Tell the jury all that was said in that conversation. A.—He was talking about his wife owing him a thousand dollars and applying for a divorce, or that she wanted a divorce. That she owed him one thousand dollars, and the oldest girl had went on as security, and if she didn't pay he would kill her and the whole outfit."

Substantially upon this state of facts, the contention for the defendant is, that the evidence tended to show that the defendant, at the time of the shooting, was suffering from the delirium tremens; and if the jury so found, as a consequence he was temporarily insane and must be acquitted. Hence, he claims that the instruction given by the court did not cover this phase of his defense, and therefore the instructions asked to that effect ought to have been given.

The court gave these instructions: "When a person is charged with the commission of a crime, he is entitled under the law to interpose as a defense a plea of insanity,—that is, unsoundness of mind, a derangement of intellect,—and if it be established upon the trial that the accused, at the time of the commission of the act, was laboring under such a defect of reason as not to know that the nature and quality of the act he was doing was wrong, he is entitled to an acquittal; but if it appears that the accused, although suffering from mental derangement, had capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he did, and that he had knowledge and consciousness that it was wrong and crimi-

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nal, and would subject him to punishment, the defense will fail.

"If you are morally certain that at the time the prisoner committed the act he was laboring under such a defect of reason from disease of mind as not to know the nature, quality, or consequences of the act he was committing, and was unable at said time to distinguish between right and wrong, then you should acquit the defendant upon the ground of insanity.

"I charge you, gentlemen of the jury, that the defense of insanity under the laws of this state will be of no avail unless it is proven beyond a reasonable doubt that the accused, at the time of the commission of the act, labored under a diseased state of mind, and that it was so excessive that it overwhelmed his reason, conscience, and judgment."

We think these instructions covered the ground as to insanity. "In all cases," said NORTON, J., "where insanity is interposed as a defense, whether such defense be alcoholism in its chronic form, or in its acute form, or delirium tremens, or dipsomania, affective or emotional, ideational, or whether it be designated by any other of the various technical terms denoting peculiar forms of insanity,—the question is, whether such insanity rendered the person laboring under it incapable of distinguishing between right and wrong in respect to the act he was about to commit." (*State v. Erb*, 74 Mo. 203.) In the instruction given by the court, the jury was told, that if at the time the defendant shot his wife, he was insane, laboring under such a defect of reason that he did not know and comprehend the nature and quality of the act when he committed it, he was entitled to an acquittal; but that if he had capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act, he should be convicted. This was virtually saying to the jury, that to entitle the defendant to a verdict of not guilty on the ground of insanity, they must find from the evi-

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dence that the defendant, at the time of shooting his wife, was of unsound mind,—that is, that his mental faculties were so deranged and perverted as to constitute unsoundness of mind and render him incapable of distinguishing between right and wrong, and of knowing whether the act he committed was right or wrong.

Under a similar instruction in *State v. Murray*, 11 Or. 418, THAYER, J., said: "The jury was told that if they were satisfied that at the time the prisoner committed the act, he was laboring under such a defect of reason from disease of the mind as not to know the nature, quality, or consequences of the act he was committing, or that if he did know it, he did not clearly understand what he was doing was wrong, then they should acquit him upon the ground of insanity. This was as far as the court could possibly go under the law." It seems to us the instructions given by the trial court are in conformity to the rulings of this court, covered the ground as to insanity, and rendered it unnecessary to give the instructions asked, conceding that they correctly stated the law applicable to the facts.

But it is extremely doubtful whether there is anything in the facts of this case at the time the shooting occurred upon which to found an instruction upon the theory that the defendant was suffering from temporary insanity as the result of intoxication or delirium tremens. All the testimony produced bearing upon the mental condition of the defendant a short time after the shooting, is to the effect that he was perfectly rational, and that he talked as rational as he ever did talk. But however this may be, the defense of insanity arising under the facts was put to the jury, and as we think, fairly and justly to the defendant.

Upon the other phase of the case, as to how far drunkenness may be proved to show the mental status of the defendant at the time of the shooting, so as to enable the jury to determine the intent of the accused in committing the act, the court instructed the jury as follows: "If you believe,

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from the evidence of this case, that the defendant, at the time of the commission of the crime charged in the indictment, was in a state of voluntary intoxication, this fact of itself does not render the act less criminal, and in this sense, I charge you, is not available as a defense; but upon the question whether the act was done with deliberation and premeditation, as charged in the indictment, it is proper to be considered by you in connection with all other facts appearing on the trial in determining the degree of guilt." Our code provides that "no act committed by a person while in the state of voluntary intoxication, shall be deemed less criminal by reason of his having been in such condition; but whenever the actual existence of any particular motive, purpose, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." (Hill's Code, § 1358.) All the authorities agree that drunkenness is no excuse for crime. But where, as in this state, and others with statutes which have degrees of murder and make deliberation and premeditation ingredients of the crime of murder in the first degree, the question of intent becomes a material fact, and evidence of intoxication is admissible and proper to be taken into consideration by the jury in determining the question as to premeditation and deliberation in murder of the first degree. The defendant's intoxication is submitted to the jury simply for the purpose of showing a want of premeditation.

In *Farrell v. State*, 43 Tex. 508, the court says: "The correct rule upon this subject is, that although drunkenness neither aggravates nor excuses an act done by a party while under the influence, still it is a fact which may affect both physical ability and mental condition, and may be essential in determining the nature and character of the acts of the defendant, as well as the purpose and intention

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with which they are done." The fact of intoxication is not admitted as an excuse for the crime, but as a means of determining its degree, when a question arises as to the particular state of mind of the accused at the time when he committed a crime. In other words, the fact of intoxication is to be submitted to the jury with the other facts in the case, for the purpose of enabling them to determine the intent of the accused in committing the act. (*People v. Williams*, 43 Cal. 344; *State v. Bell*, 29 Iowa, 316; *Nichols v. State*, 8 Ohio St. 435; *State v. Mahn*, 25 Kan. 182; *Haile v. State*, 11 Humph. 154; *Golden v. State*, 25 Ga. 527; 4 Am. & Eng. Ency. Law, 705.)

The evidence in this case showed that the defendant was intoxicated when he left Walla Walla, and that he had been drinking heavily, off and on, for two weeks. All the facts in respect to his conduct while he was at his home during the day, and shortly after he shot his wife in the evening, were fully detailed to the jury. The substance of the facts we have set out. If it be true that the defendant was intoxicated at the time he shot his wife, the trial court fully met that aspect of the case when it charged the jury that the fact of intoxication should be considered with the other facts in determining the degree of guilt; that while drunkenness of itself could not avail as a defense, yet it should be considered upon the question whether the defendant committed the act with deliberation and premeditation. On the other hand, if the defendant was laboring under temporary insanity as the result of intoxication, or delirium tremens from the excessive use of strong drink, so as to render him incapable of understanding the nature and consequences of the act which he committed, the trial court fully met this aspect of his defense, and charged the jury that if they were satisfied at the time the defendant committed the act he was laboring under such a defect of reason, or derangement of mind as not to know the nature, quality, and consequences of the act he was doing,—in a

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word, that if he did not understand when he shot his wife that he was doing wrong,—the jury must acquit him. It seems to us, in the light of the evidence, that the trial court covered by its instructions every ground upon which the defendant could rest his defense, and that there was no error in refusing the instructions asked.

In view of the sacredness of life, and the protection which the law throws about it, we have examined carefully the evidence and the instructions given by the trial court, so as to guard against any liability to error, and to give the defendant every benefit and advantage the law affords, and the result of our deliberation is, that we find no error, and that the judgment must be affirmed.

[Filed June 21, 1892.]

STATE OF OREGON v. EVAN CARVER.

CRIMINAL LAW—MURDER—DELIBERATE USE OF DEADLY WEAPON—PRESUMPTION.—The conclusive presumption of an intent to murder arising from the deliberate use of a deadly weapon causing death within a year, standing alone, will only sustain a conviction for murder in the second degree; and there must be some other proof of the deliberation and premeditation necessary to constitute murder in the first degree, before a defendant can be convicted of the latter crime.

Union county: JAMES A. FEE, Judge.

Defendant appeals. Reversed.

R. Eakin, for Appellant.

Geo. E. Chamberlain, attorney-general, for Respondent.

BEAN, J.—The defendant was indicted, tried, and convicted of the crime of murder in the first degree, for the killing of Francis La Bord on the twenty-seventh day of May, 1891, in Union county, by shooting him with a pistol. From this judgment he appeals, assigning as error the giving and refusal of certain instructions by the trial court. After instructing the jury that if the killing was done pur-

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posely and maliciously, but without deliberation and premeditation, defendant is guilty of murder in the second degree, the court proceeds: "An intent to murder is conclusively presumed from the deliberate use of a deadly weapon, causing death within a year. Hence, if you find from the evidence beyond a reasonable doubt that the defendant purposely and maliciously killed deceased by the deliberate use of a deadly weapon, causing death within a year, then your verdict should be guilty."

The defendant was indicted and on trial for murder in the first degree, and when the court used the word "guilty" in the instruction just quoted, the jury had a right to understand, and no doubt did understand, that if the killing was done purposely and maliciously, by the deliberate use of a deadly weapon, the defendant was guilty, and should be convicted of the crime charged in the indictment. In this view, the instruction is manifestly erroneous. It authorized and directed the conviction of the defendant of murder in the first degree upon proof only of murder in the second degree. The instruction entirely omits all the necessary requisites and distinguishing features of murder in the first degree, and substitutes therefor the presumption arising from the deliberate use of a deadly weapon. It correctly defines murder in the second degree only, and yet the jury must have understood that if the case as stated in the instructions was shown by the evidence, they must find the defendant guilty as charged.

In order to constitute murder in the first degree, the killing must have been done of deliberate and premeditated malice. Under the express provisions of our statute, there must be some other evidence of malice than the mere proof of the killing, unless the killing was effected in the attempt to commit a felony, and the deliberation and premeditation must be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion. (Hill's

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Code, § 1727.) The distinguishing features of this crime are matters of proof, and not of legal presumption. From the simple act of killing by the deliberate use of a deadly weapon, where nothing else is shown, the law of this state raises a conclusive presumption of an intent to murder. (Hill's Code, § 775.) But this legal presumption goes no further than to establish what is necessary to constitute murder in the second degree. To raise the crime to the higher grade of murder in the first degree, there must be some proof that the act was committed of deliberate and premeditated malice. (*State v. Lane*, 64 Mo. 319; *State v. Evans*, 65 Mo. 574.) This proof need not be express or positive. It may be inferred from the circumstances. But the proof of an intention to kill and of the disposition of mind constituting murder in the first degree, must be shown by the evidence, either directly or by necessary inference. The existence of such a state of mind, as a matter of fact, cannot be the subject of a legal presumption or inference of law. In *Commonw. v. Drum*, 58 Pa. St. 9, it was held that the legal presumption of malice, in any homicide, proves no more than what is necessary to constitute murder in the second degree, Mr. Justice AGNEW saying: "He who takes the life of another with a deadly weapon, and with a manifest design thus to use it upon him, with sufficient time to deliberate, and fully to form the conscious purpose of killing, and without any sufficient reason or cause of extenuation, is guilty of murder in the first degree. All murder not of the first degree is necessarily of the second degree, and includes all unlawful killing under circumstances of depravity of heart, and a disposition of mind regardless of social duty, but where no intention to kill exists or can be reasonably or freely inferred. Therefore, in all cases of murder, if no intention to kill can be inferred or collected from the circumstances, the verdict must be murder in the second degree." The weapon used, and the manner of its use, are important facts for the con-

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sideration of the jury in determining the degree of guilt, but are not conclusive evidence of deliberation and premeditation; nor is the deliberate use of such a weapon alone sufficient proof of the state of mind necessary to constitute murder in the first degree. "The statute has not declared that homicide effected by means of a deadly weapon," says HALLET, C. J., "shall be punished with death, but deliberate or premeditated homicide is so punishable; therefore, the ultimate point which the evidence must extend to and establish, is not the use of a deadly weapon, but the deliberation or premeditation with which the fatal act is done, and whether the intention is shown by evidence of antecedent menaces, former grudges, lying in wait, the means employed to effect the homicide, or any other circumstances which may give assurance of it, I think that it is to be submitted to the jury to find the fact under the direction of the law." (*Hill v. People*, 1 Col. 448.)

The presumption of an intent to murder, declared to be conclusive by our statute, from the deliberate use of a deadly weapon (section 775) has, therefore, no application to murder in the first degree, and goes no farther; but in order to constitute this crime, there must be some affirmative proof of deliberation and premeditation. When, therefore, the court substituted for this proof the statutory presumption arising from the deliberate use of a deadly weapon, it was prejudicial error, for which a new trial must be ordered.

There is no merit in the other assignments of error, and the definitions of deliberation and premeditation, as given by the court, are substantially the same as given by this court in *State v. Ah Lee*, 8 Or. 214. The law of self-defense was clearly and properly stated. The remarks of the district attorney, in his closing argument to the jury, to the effect that he had been advised that one of the jurors had formed and expressed an opinion concerning the merits of the case before being called and accepted as a juror, were certainly, although not so intended, calculated to injuriously

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affect the rights and interests of the defendant, and for which it would seem from the record, as we view it, the trial court should have granted a new trial; but as no proper exception or assignment of error appears in the record, it presents no question for review here.

The judgment is reversed and a new trial ordered.

[Filed June 21, 1892.]

W. V. WORMINGTON ET AL. v. W. M. PIERCE ET AL.

COUNTIES—LIMIT OF INDEBTEDNESS.—An indebtedness incurred by a county in excess of five thousand dollars is void, unless incurred to suppress insurrection or repel invasion, and its payment will be enjoined at the suit of a tax-payer of the county.

Umatilla county: M. D. CLIFFORD, Judge.

Defendants appeal. Affirmed.

The object of this suit is to enjoin the authorities of Umatilla county from issuing to one Byers warrants of said county to the amount of three thousand five hundred dollars, on the ground that said county was then indebted in a greater sum than is permitted by the constitution. The suit is by two tax-payers.

A brief summary of the material parts of the complaint is as follows: That plaintiffs are citizens and tax-payers of Umatilla county, Oregon, and that the defendant Pierce is the county clerk of said county; that in the fall of 1890, the defendant Byers and others constructed a bridge across Umatilla river, in the city of Pendleton, in said county, at an expense of several thousand dollars; that no part of said bridge is situated upon a county road or any other public highway except Lee street in said city, and that said bridge is wholly in said city; that the defendant Byers, while the county court of said county was sitting for the transaction of county business at the November term, 1890, presented a claim against said county for the sum of three thousand

22 606
23 440
30* 450
31*1051

42 606
47 376
22 606
30 537

22 606
133 844
22 606
37 468

28 606
48 472

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five hundred dollars on account of money claimed by him to have been expended in the construction of said bridge; that on the twelfth day of December, 1890, said county court, sitting for the transaction of county business, made an order allowing said W. S. Byers, for money alleged by him to have been expended in the construction of said bridge, the said sum of three thousand five hundred dollars, and ordered that a warrant be drawn upon the treasurer of said county for said sum of money, a copy of which said order is hereto annexed, made a part of this complaint, and marked "Exhibit A," and made a part hereof; that said warrant has not yet been drawn by the defendant Pierce; that in auditing and allowing said claim to the said W. S. Byers, the said county court exceeded its jurisdiction, and that said court had no right or authority to allow any part of said claim, for the following reasons: (1) That all the indebtedness hereinafter stated was created by said Umatilla county for purposes other than to suppress insurrection or repel invasion, (2) that said county of Umatilla was, when said order was allowed, to wit, on December 12, 1890, and had been for more than two years prior to said date, and is now, in debt in a sum far exceeding the sum of fifty thousand dollars, and that said indebtedness of more than fifty thousand dollars was and is evidenced by orders and warrants issued by the county upon its treasurer, which had been presented to said treasurer for payment, and had not been paid because said county had and has no funds with which to pay them, and that they were indorsed by said treasurer "Not paid for want of funds," and that said county court has made and could make no provision for the payment of said sum of three thousand five hundred dollars, or any part thereof, to said defendant Byers; and that by reason of said indebtedness of said county, said county court, in allowing said sum to said Byers, violated section 10 of article 11 of the constitution of this state; (3) that when said sum was allowed to said

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Byers as aforesaid, and for more than a year prior thereto, there were no funds in the county treasury of said county that could be applied to the payment of the said three thousand five hundred dollars to said Byers; (4) that the estimated cost of said bridge far exceeded two hundred dollars; but notwithstanding this fact, neither the county court nor any member thereof in any manner advertised for sealed plans, specifications, or diagrams, or for bids for the same, or for the construction of said bridge, nor was the contract for the construction of said bridge let to the lowest responsible bidder, nor was said contract let by the county court in any manner, nor was its construction in any manner superintended by the county court or any member thereof or any person appointed by said court, and that by reason of these facts said court had no power or right to allow any part of said sum of three thousand five hundred dollars to said Byers; (5) that by section 21 of article 7 of the charter of the city of Pendleton, passed in 1889, that part of Umatilla county within the limits of the city of Pendleton is expressly excepted out of the jurisdiction of the county court of said county upon the subject of roads and highways among others, and by reason thereof said county court had no jurisdiction to make roads, highways, or bridges within said city, and said court had no authority to allow any part of said three thousand five hundred dollars to said Byers; that said defendant W. M. Pierce threatens to issue said warrant to said Byers for said three thousand five hundred dollars, and that he will so issue it if he be not restrained from so doing by an order or decree of this court, and that if said order should be so issued it would be almost impossible to prevent its payment, and that the payment of said order would injuriously affect the pecuniary rights of these plaintiffs as tax-payers, and that they have no remedy at law herein; that "Exhibit A" contains the only order ever made by said court for or concerning the construction of said bridge, or the payment of anything there-

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for; wherefore, the plaintiff prays for a decree forever restraining the defendant Pierce, as clerk of said county, or his successor in office, from any time issuing said order or warrant to said W. S. Byers for said three thousand five hundred dollars, or for any sum, and restraining said Byers from drawing said warrant, and for costs and disbursements.

The answer, after denying the material allegations of the complaint, alleges the following new matter by way of defense: "That prior to the time of the construction of the bridge mentioned in plaintiffs' complaint, the above-named W. S. Byers, by and with the consent, knowledge, and approval of the county court of Umatilla county, sitting to transact county business, entered into a contract with one Dion Keif for the construction of said bridge, at the agreed and stipulated price of seven thousand and sixteen dollars; that said contract for the construction of said bridge was by said Byers let to the said Dion Keif for the said sum of seven thousand and sixteen dollars; that Keif was the lowest responsible bidder for the construction thereof. The contract was made and entered into and let by and with the knowledge, consent, and concurrence of the said county court, sitting to transact county business, which said contract was approved by said county court; that said county court did contract and agree with the said W. S. Byers, that after the construction of said bridge, if the same was constructed and completed in a satisfactory manner, they would pay the said Byers, out of the county funds of Umatilla county therefor, one-half of the contract price for the construction of said bridge, to wit, the sum of three thousand five hundred dollars; that after the completion of said bridge, and in pursuance of said contract, said county court, sitting to transact county business, did inspect the same and approve and receive the same in all respects for and on behalf of the said county; that in pursuance of said contract, and after the completion of said bridge, and its acceptance by the said county court as aforesaid, the

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said W. S. Byers presented to the said county court his bill for one half of the contract price for the construction thereof, viz., for the sum of thirty-five hundred dollars; that thereafter said county court, sitting to transact county business, made an order allowing said W. S. Byers said sum of thirty-five hundred dollars in pursuance of said contract."

Issues were duly formed by the filing of a reply, and the cause referred to take the evidence. After the evidence was taken, the cause was duly heard, and the court found the facts and law to be with the plaintiffs, and entered a decree in accordance with the prayer of the complaint from which the defendants have appealed.

J. C. Leasure, and Bailey & Balleray, for Appellants.

W. M. Ramsey, for Respondents.

STRAHAN, C. J.—The respondents rely upon several objections to sustain the decree, but the one mostly pressed upon our attention arises out of the provision in the constitution of the state limiting county indebtedness, which is as follows: "No county shall create any debts or liabilities which singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection or to repel invasion." (Oregon Const. Art. 11, § 10.) Facts are alleged in the complaint, and not denied by the answer, showing that the debts of Umatilla county are not within the saving clause of this section; therefore, we are to determine the effect of this inhibition of the constitution upon the power of the county to create debts and liabilities after the limit of five thousand dollars shall have been reached, if that fact shall appear.

Before proceeding to that question, however, it is proper to remark that for some reason that does not appear, the complaint alleges that the indebtedness of Umatilla county at the time specified exceeded fifty thousand dollars, instead of five thousand, as specified in the constitution, thus impliedly admitting that a county might become indebted

in any sum less than fifty thousand dollars. At least, that would be the ordinary implication; but in a case presenting a constitutional question of the gravest importance, we are not disposed to allow a question of pleading to control its determination, if it can be avoided. We think; therefore, that as the greater includes the less, we may inquire as to any and all indebtedness exceeding five thousand dollars, notwithstanding the form of the allegation. What the exact amount of the debts and liabilities of Umatilla county at the time of the order complained of was made, does not appear from the evidence with entire certainty; but that they exceeded the amount limited in the constitution, there can be no doubt. Mr. Hartman was county clerk of said county on the thirtieth day of June, 1890. At that time he made an examination into the financial condition of said county for the purpose of making an annual exhibit as clerk. At that time the amount of debts and liabilities of the county were one hundred and twenty thousand six hundred and six dollars and fifty-seven cents. The total cost of the new court-house and jail of said county up to July 1, 1890, was eighty-eight thousand six hundred and forty-nine dollars and fifty-two cents. On his cross-examination, this witness stated that at the time the outstanding warrants aggregated one hundred thousand dollars, the assets were about one hundred and thirty-nine thousand four hundred and thirty-one dollars and sixty-nine cents. At the time the cost of the construction of the court-house and jail was estimated, there was in the fund the sum of seventy-seven thousand dollars. The assets of the county were made up as follows: Bills receivable, twenty-seven thousand five hundred and thirty-four dollars and four cents; delinquent taxes, seventy-eight thousand six hundred and seventy dollars and twenty-nine cents; in sheriff's hands, two hundred and eighty-six dollars and ninety-two cents; cash in treasury in court-house and jail fund, ten thousand one hundred and thirty-six dollars and

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fifty-two cents; cash in treasury, one hundred and fifty-seven dollars; cash in treasury in school fund, six thousand nine hundred and sixty-three dollars and fifty-two cents; cash in treasury in county fund, twelve thousand seven hundred and one dollars and forty cents. Taxes were delinquent as far back as six years. It also appeared that ten thousand dollars of the county's indebtedness was for a set of abstract books, which the county caused to be prepared in 1890, which sum still remained unpaid at the time of the trial. None of the evidence offered on the part of the plaintiff was contradicted in any way. It may, therefore, be taken as true, that at the time the county court made the order allowing the defendant Byers three thousand five hundred dollars on account of said bridge, the county was indebted in a very large amount. The debt for the abstract books alone, which still remained unpaid, was just twice the amount of debt which the county might lawfully create.

The constitution of this state contains many checks and safeguards. Wherever it touches the question of indebtedness, aid to corporations, etc., it evinces a purpose on the part of its framers, and of the people who adopted it, to profit by the experience of the people in some of the older states. It was made the duty of the legislature, by article 11, section 5, of the constitution, in incorporating towns and cities, to restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit. By section 6 of said article, the state is prohibited from being interested in the stock of any company, association, or corporation; and by section 7 the legislature is prohibited from loaning the credit of the state, or in any manner creating any debts or liabilities exceeding the sum of fifty thousand dollars, except in case of war, or to repel invasion, or to suppress insurrection; and it is expressly provided that every contract of indebtedness entered into or assumed by or on behalf of the state, when all its debts and liabili-

ties amount to said sum, shall be void and of no effect. Section 8 of said article disables the state from assuming the debts of any county, town, or other corporation whatever, unless such debt shall have been created to repel invasion, suppress insurrection, or to defend the state in war; and section 9 forbids any county, city, town, or other municipal corporation, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever, or raise money for, or loan its credit to, or in aid of, any such company, corporation, or association.

These citations are sufficient to show the spirit which pervades the constitution, and to indicate the earnest solicitude of its framers to guard the people, whose fundamental law it is, against the burdens of corporate debts and entangling alliances with corporations; but in giving effect to that provision of the constitution under consideration, we need not resort to extrinsic matters, nor even to other portions of the instrument. Its language is plain and mandatory. Words, when found in a constitution, as well as in a statute, are to be understood in their ordinary signification. That which is plainly expressed, admits of no construction. (*People v. Wall*, 88 Ill. 75.) The constitution of Colorado contains a similar limitation on the power of counties to contract debts. In commenting upon it, the supreme court of that state said: "It is simply a declaration that the county, within certain limits, shall live within its income, and not that its income shall be more or less. The limit of indebtedness fixed was a matter of judgment about which men might differ, and it is not for us to substitute our judgment for that of the convention." (*People ex rel. v. May*, 9 Col. 91.)

It was argued on the part of the appellants, that the phraseology of the provision of the constitution under consideration had reference only to such debts and liabilities as are created or contracted by the direct action of the

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county court, and not to such as arise by operation of law in the ordinary course of business in the county; that the latter class of debts and liabilities are created by law and not by the county, and therefore do not fall within this inhibition. There is much force in the argument, and it received the sanction of this court in *Grant County v. Lake County*, 17 Or. 453. But that does not avoid the difficulty in this particular case, for the reason that the evidence shows that the debts and liabilities which the county had created, and which it was not compelled by law to create, did exceed the sum of five thousand dollars. A review of the cases on this subject would not be profitable. It is conceded that they are not uniform; but the lack of uniformity arises more from differences in the language of the various constitutions than from any divergence in principle. Besides, we have not the time to go further in the discussion of the question than is actually necessary to dispose of the case presented by this record. Finding that Umatilla county had created debts and liabilities in excess of five thousand dollars which were unpaid at the time the order complained of was made, the same was beyond the power of the county court, and its action thereon was void.

It follows that for the reasons here given the decree appealed from must be affirmed.

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CONTRACTS.

1. **CONSTRUCTION OF BOND—RAILROADS—RIGHT OF WAY.**—In an action on a bond conditioned for the payment to a railroad company of all reasonable sums of money by it paid out in securing a right of way, depot grounds, and terminal facilities for a line of railway between two points, it was held: (a) that the obligors are not liable for a certain sum in gross for the whole right of way, etc., but only for such several sums as are reasonable in each instance where it was necessary to expend them for that purpose; (b) that the award of the arbitrators in contested cases about the right of way, is competent evidence of the reasonableness of the amounts paid in those cases; and (c) that the bond does not indemnify the company for money expended in criminal prosecutions arising out of disputes about the right of way.—*O. R. & N. Co. v. Swinburne*, 574.
2. **CONSTRUCTION OF DEEDS—HIGHWAY NAMED IN CONVEYANCE—ESTOPPEL.**—It is a settled rule of law that when a grantor conveys land expressly with reference to a road or street over his other land, he and his successors in interest cannot, by reason of estoppel, so use the soil of the highway as to defeat the enjoyment thereof by the grantee, his heir, or assigns; but this principle will not be applied in the construction of a deed, unless it clearly appear that it was the intention of the parties to consider the use of the highway as a part of the transaction, although there may be, in the description of the land, some reference to the highway as a monument.—*Lankin v. Terwilliger*, 97.
3. **GUARANTOR—SURETY.**—A guarantor, like a surety, is bound only by the strict letter or precise terms of the contract of his principal whose performance he has guaranteed.—*Staver v. Locke*, 519.
4. **TIME OF PERFORMANCE—CONDITION PRECEDENT.**—In contracts for the sale of personal property, if time appear to be of the essence thereof, on a fair consideration of the language and circumstances, stipulations in regard to it will be construed as conditions precedent.—*Sun Pub. Co. v. Minn. Type Foundry Co.* 49.
5. **SALE OF CHATTELS—ENTIRETY OF CONTRACT.**—The consideration being entire, and the goods having been ordered for a particular purpose known to the seller, the buyer is not bound to accept all or any part of those tendered unless they all substantially meet the requirements of the contract, although some of the goods may be of the kind ordered.—*Id.*
6. **CONTRACT OF SALE—INSPECTION OF GOODS.**—In offering delivery under contracts for the sale of personal property, the vendor is bound to give the vendee a reasonable opportunity to satisfy himself by inspection of

CONTRACTS—CONCLUDED.

the goods, before paying for them, that they are in accordance with the contract.—*Id.*

7. **WRITTEN INSTRUMENT—DATE—DELIVERY—INTENT OF PARTIES.**—Unless there is something to indicate a different intention, a written instrument takes effect from its delivery, and not from its date; but where it appears from the language of the instrument that it was intended to cover a certain period, or to incur a certain liability, although anterior to its actual delivery, it will, when delivered, relate back and take effect according to its terms and the intention of the parties.—*O. R. & N. Co. v. Swinburne*, 574.

See **HUSBAND AND WIFE**, 1; **VENDOR AND VENDEE**, 1, 2.

CONVERSION. See **EVIDENCE**, 3.

CORPORATIONS. See **PARTNERSHIP**, 1.

COUNTERCLAIM. See **EQUITY**, 1, 2.

COUNTIES.

LIMIT OF INDEBTEDNESS.—An indebtedness incurred by a county in excess of five thousand dollars is void, unless incurred to suppress insurrection or repel invasion, and its payment will be enjoined at the suit of a tax-payer of the county.—*Wormington v. Pierce*, 606.

See **ROADS AND HIGHWAYS**, 2, 3.

CRIMINAL LAW.

1. **INDICTMENT—WORDS OF STATUTE.**—In indictments for statutory misdemeanors, it is sufficient to charge the offense in the words of the statute, provided the crime is thereby set forth with such certainty as will apprise the accused of the offense imputed to him.—*State v. Shaw*, 287.
2. **INSANITY.**—In criminal actions, if it appear from the evidence, to the satisfaction of the jury, beyond a reasonable doubt, that at the time of the commission of the criminal act charged in the indictment, the defendant was laboring under such a defect of reason, from disease of his mind, as not to know the nature, quality, or consequences of the act he was committing, and was unable at the time to distinguish between right and wrong, he is entitled to be acquitted on the ground of insanity.—*State v. Zorn*, 591.
3. **DRUNKENNESS—MOTIVE AND INTENT.**—Drunkenness of the defendant in a criminal action does not excuse him, but may be considered by the jury in determining the purpose, motive, or intent with which he committed the criminal act charged against him.—*Id.*
4. **INTIMIDATION OF WITNESS.**—Before evidence can be received against a defendant in a criminal prosecution, of attempts to bribe or intimidate a witness for the state, the defendant must be shown to have authorized such attempts or be connected therewith.—*State v. Day*, 160.

CRIMINAL LAW—CONCLUDED.

MURDER—DELIBERATE USE OF DEADLY WEAPON—PRESUMPTION.—The conclusive presumption of an intent to murder arising from the deliberate use of a deadly weapon causing death within a year, standing alone, will only sustain a conviction for murder in the second degree; and there must be some other proof of the deliberation and premeditation necessary to constitute murder in the first degree, before a defendant can be convicted of the latter crime.—*State v. Carver*, 602.

DAMAGES.

DEATH OF PARTY—MEASURE OF DAMAGES—EARNING CAPACITY.—Under the statute, the age and sex, the general health and intelligence of the deceased, his habits and capacity, mental and physical, to earn and acquire property, are all to be considered in estimating the damages; and this would include skill in the management of wealth, or capacity to manage affairs which would be of an advantage to an estate, and the loss of which would prove a detriment to it.—*Mullen, Admr. v. O. S. L. etc. Ry. Co.* 430.

See EQUITY, 3; JURESS, 1; LANDLORD AND TENANT 1; VENDOR AND VENDEE, 2.

DEEDS. See CONTRACTS, 2; EQUITY, 5; JUDGMENTS, 3.

DESCENTS. See WILLS, 5, 7.

DIVORCE.

HABITUAL GROSS DRUNKENNESS.—Occasional acts of intoxication are not sufficient to make one an habitual drunkard. There must be the involuntary tendency to become intoxicated as often as the temptation is presented, which comes from fixed habit acquired from frequent and excessive indulgence.—*McBee v. McBee* 29

DOWER.

EXECUTION SALE—ADMINISTRATION.—A wife's right to dower is not affected by an execution, or administrator's sale of her husband's land.—*House v. Fowle*, 303.

See HUSBAND AND WIFE, 1.

DRUNKENNESS. See CRIMINAL LAW, 3; DIVORCE, 1.

EASEMENTS. See ROADS AND HIGHWAYS, 1.

EJECTMENT.

1. ADVERSE HOLDING—PRIVITY OF POSSESSION—EVIDENCE.—In actions of ejectment where the defense relied upon is adverse possession for the statutory period of limitations, made up of several hostile holdings, each less than the requisite time, it is incumbent on the defendant to establish privity of possession in the successive occupants under whom he claims; but such privity may rest in deed or in parol.—*Vance v. Wood*, 77.

EJECTMENT—CONCLUDED.

2. **EVIDENCE—ACT OF CONGRESS.**—In defense of an action of ejectment by a settler on government lands against a railway company to recover the land whereon the company's road is located, it is competent for the defendant to show that prior to the plaintiff's settlement, it complied with the requirements of the act of congress of March 3, 1875, granting to railroad companies the right of way over the public lands; and it is sufficient if, from an inspection and construction of the documents offered in evidence, it appears that such compliance was prior to the settlement, although the exact date does not appear.—*Frizzelle v. O. R. & N. Co.* 463.

EQUITY.

1. **EQUITABLE COUNTERCLAIM—LEGAL DEFENSES.**—Matters of purely legal cognizance in no way connected with the suit, and not arising out of the transaction upon which the plaintiff bases his claim for relief, cannot be pleaded as counterclaims in a suit in equity.—*Sears v. Martin*, 311.
2. **INJUSTICE—FRANCHISE—HOSTILE INTERFERENCE.**—Before a court of equity will interfere to restrain an infringement upon the enjoyment of a franchise, it must appear that some hostile overt act has been done by the party complained of; a mere intent not acted upon, is insufficient.—*Umatilla Irrigation Co. v. Umatilla Improvement Co.* 366.
3. **EQUITY JURISDICTION—FAILURE OF EQUITY—REMEDY AT LAW.**—The rule that equity having assumed jurisdiction of a case for one purpose, will retain it for all purposes and administer complete relief, does not apply where there is a failure of proof of plaintiff's equity, but he will be remitted to such remedy as he may have at law.—*Dodd v. Home Mutual Ins. Co.* 3.
4. **EQUITABLE LIEN—PRIOR EQUITY—DORMANT JUDGMENT.**—A party in possession of land under a defective deed, and having an equitable lien thereon for the purchase price paid by him, being otherwise without notice, is not affected by a subsequent suit to subject the land to the payment of a judgment against one who is alleged to have advanced the money for the conveyance to the grantor in the defective deed, but who by the record is a stranger to the title, especially where the judgment was dormant when the possession began under the defective deed.—*Davison v. Mackay*, 247.

Per STRAHAN, C. J.

5. **MORTGAGE—SPECIFIC PERFORMANCE.**—A party who holds a deed for land, absolute in form, but in fact a mere security for money loaned, is a mortgagee only, without title to the land, and will not be compelled by a decree in equity to specifically perform a contract to convey the land, because such a decree would be ineffectual.—*Adair v. Adair*, 115.

Per BEAN, J.

6. **SUIT TO REDEEM—CASE IN JUDGMENT.**—Pleadings examined, and held, that the bill discloses facts sufficient to constitute a cause of suit for redemption of the lands in controversy from the lien of a mortgage.—*Id.*

EQUITY—CONCLUDED.

7. **MISTAKE—RESTORATION OF CANCELLED MORTGAGE.**—If a holder of a mortgage take a new mortgage as a substitute for a former one, and cancel and release the latter in ignorance of the existence of an intervening lien upon the mortgaged premises, although such lien be of record, equity, looking to substance rather than form, will, where the rights of third parties have not been prejudiced, disregard the cancellation of the former mortgage and restore it to its original priority.—*Pearce v. Buell*, 29.
8. **UNLIQUIDATED DAMAGES—EQUITABLE COUNTERCLAIMS.**—Claims for unliquidated speculative damages, not being such as would sustain a suit between the parties, are not proper equitable counterclaims.—*Conn. v. Conn*, 452.

ERRORS. See **APPEALS**, 5, 6.

ESTOPPEL. See **CONTRACTS**, 2.

EVIDENCE.

1. **BOUNDARIES—COURSES AND DISTANCES—MONUMENTS.**—The location of a disputed boundary is a question of fact to be determined from the evidence, wherein the object is to follow in the "footsteps of the surveyor" who established the original line; and, in so doing, courses and distances must yield to monuments, such as marks and blazes on trees and other like indicia of the line.—*Vandusen v. Shieley*, 64.
2. **CONTRACT FOR SALE OF LAND—ABSTRACT.**—In an action on a contract for the sale of land, whereby the defendant agreed to convey a fee simple title and to furnish an abstract showing such title, the abstract tendered by the defendant may be admitted in evidence, not as proof of the title to the land, but as tending to show a breach or performance of the condition of the contract requiring an abstract.—*Kane v. Rippey*, 299.
3. **CONVERSION—CHATELS SEVERED FROM REALTY—TITLE TO LAND—PAROL TESTIMONY.**—In an action for the conversion of chattels, the ownership of which depends upon the fact that they have been severed from the land of plaintiff, the title to the land is only collateral to the main fact in dispute, and may be proven by parol.—*Hodson v. Goodale*, 68.
4. **DAMAGES—OPINION OF WITNESS.**—The general rule of evidence is, that a witness must state facts, and not draw conclusions from them or give opinions; and hence, in actions for damages, while a witness may state the facts upon which the damages are predicated, he cannot give his opinion concerning the amount of damage resulting from any given act or omission, because it is the exclusive province of the jury to assess damages under the rules of law declared by the court.—*Burton v. Severance*, 91.
5. **EXPERT TESTIMONY—HARMLESS ERROR.**—When the matter under consideration before a jury is of that character about which any one of ordinary intelligence, without any peculiar habits or course of study, is able

EVIDENCE—CONCLUDED.

to form a correct opinion, expert testimony as to such matter is inadmissible; but when, upon the whole case, it is manifest that if such testimony had not been introduced, the jury could not have reached a different conclusion from that expressed in the opinions of the experts, the admission of such evidence will be regarded as a harmless error.—*Fisher v. O. S. L. etc. Ry. Co.* 533.

6. **OFFER OF WRITING IN TESTIMONY.**—Where it does not appear that a writing has been altered by some unauthorized person, a party offering it in evidence will not be permitted to select that part of it favorable to his case and exclude another part which might operate unfavorably.—*Goodman v. O. R. & N. Co.* 14.
7. **WEAKER EVIDENCE—PRESUMPTION OF DISTRUST.**—If weaker and less satisfactory evidence be offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.—*Wimer v. Smith*, 439.

See ABSTRACT OF TITLE, 1; EJECTMENT, 1, 2; FRAUD, 1, 2; Juries, 5; MASTER AND SERVANT, 1, PLEADING AND PRACTICE, 13, 14, 15; WITNESSES, 1.

EXECUTION. See DOWER, 1.

EXECUTORS AND ADMINISTRATORS.

1. **ADMINISTRATOR—TRUSTEE—PROPERTY OF ESTATE—CONFLICTING CLAIMS.** An administrator is a *quasi* trustee, and should be a person who is not interested adversely to the estate in property which is the subject of administration, and who will, while carefully guarding the interests of the estate, stand at least indifferent between it and claimants of the property.—*In re Estate of Mills*, 210.
2. **FAILURE TO FILE INVENTORY—REMOVAL.**—A failure to make and return an inventory of the estate by an executor or administrator, within the time allowed by law, is a violation of duty for which he is subject to removal.—*Id.*
3. **ESTATES—FORECLOSURE OF MORTGAGE—DECEASED MORTGAGOR.**—The death of a mortgagor and proceedings in the county court concerning the settlement of his estate do not prevent or suspend foreclosure of the mortgage. The only consequence of a failure to present the claim to the executor or administrator before bringing suit is, that a personal judgment cannot be rendered for a balance of the debt remaining unpaid after the security is exhausted. *Verdier v. Bigne*, 16 Or. 208, followed and approved.—*Teal v. Winston*, 439.

See WILLS, 1, 2, 3, 4.

FALSE IMPRISONMENT.

1. **VOID PROCESS—IRREGULARITIES—WAIVER.**—A void process is no justification for an arrest, but one merely irregular or voidable is a complete defense until set aside; and where a defendant appears and puts in bail

FALSE IMPRISONMENT—CONCLUDED.

without moving to set aside such irregular or voidable process, he waives all defects in the manner of its issue.—*Neimitz v. Conrad*, 164.

2. **ARREST—REGULAR PROCESS—IRREGULAR SERVICE.**—The process of arrest being sufficient, the party who in good faith upon proper cause sues it out, is not responsible for irregularities in the manner of its execution, unless it affirmatively appear that the officer so acted by direction of the person suing out the writ.—*Id.*
3. **PLEADING—VARIANCE.**—Where the complaint charges false imprisonment by an arrest void *ab initio*, it is a material variance to admit evidence of an arrest lawfully made, but which afterward became unlawful imprisonment by reason of a refusal to receive bail.—*Id.*

FRANCHISE. See **EQUITY**, 2.**FRAUD.**

1. **ALLEGATA AND PROBATA—FAILURE OF PROOF.**—Where a party seeks relief on the ground of fraud perpetrated by another, he must not only allege, but must also prove, that he relied upon, and was innocently, on his part, misled by the fraudulent statements of the other party; and unless the evidence shows this, there is a failure of proof.—*Pearce v. Buell*, 29.
2. **FALSE REPRESENTATIONS—JUDGMENT OF PURCHASER.**—A party seeking relief on the ground of fraud perpetrated upon him by means of false representations, must not only clearly prove the fraud, but must also show that he relied upon the false representations; and although such false representations were made as alleged, yet, if, having full means of knowing the truth, he acted on his own judgment in the transaction from which he seeks relief, he cannot complain.—*Wimer v. Smith*, 469.
3. **NEGLIGENCE—GOOD FAITH.**—Where A, either negligently or intentionally, gives the control of his property to B, and thus places him in a position to defraud C in relation thereto, if a loss occur thereby without the fault of C, it should fall on A as between him and C, because the act of A facilitated the fraud.—*Flore v. Ladd*, 202.
4. **SUPPRESSION OF FACT—UNFAIR CONTRACT.**—The suppression or failure to disclose a material fact, although through ignorance of the fact, or without intent to deceive, may render a contract so hard, or unequal, or unfair, that a court of equity will refuse to enforce the same against the party thus misled.—*Dodd v. Home Mutual Ins. Co.* 3.

GUARANTOR. See **CONTRACTS**, 3.**HUSBAND AND WIFE.**

1. **CONTRACTUAL RELATION—DOWER AND CURTESY.**—A husband and wife cannot contract with each other concerning the possible estate of dower or curtesy either may have in the lands of the other by virtue of their marriage.—*House v. Fowle*, 303.
2. **EXPENSES OF FAMILY—LIABILITY OF WIFE.**—Under section 2874, Hill's Code, which provides that "the expenses of the family and the educa-

HUSBAND AND WIFE—CONCLUDED.

tion of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately," a wife is liable for the purchase price of a buggy bought for and used in the family as a family vehicle.—*Dodd v. St. John*, 250.

INDICTMENT. See CRIMINAL LAW, 1.

INSANITY. See CRIMINAL LAW, 2; WILLS, 6, 8.

INSURANCE. See PLEADING AND PRACTICE, 5.

INTEREST. See ACCOUNT STATED, 2.

JUDGMENTS.

1. JOINT PARTIES—INDIVIDUAL LIABILITY.—As between several parties to a judgment, not adversary to each other in the original action, the question of the liability of any of them is always open to subsequent inquiry by appropriate litigation.—*Rauson v. Stewart*, 256.
2. JUDGMENT LIEN—HOSTILE EQUITIES—REFORMATION OF MORTGAGE.—A judgment lien attaches only to the actual and not to the apparent interest of the judgment debtor in land, and is subject to any equitable estate therein hostile to the judgment debtor existing at the time the judgment was rendered, whether known to the judgment creditor or not; and for the purpose of protecting such equitable estate, courts of equity will correct a mistake in a mortgage upon which the equitable estate depends, and, as corrected, give it priority over a subsequently acquired judgment, so that the judgment lien will be confined to the actual interest of the judgment debtor in the land.—*Meier v. Kelly*, 136.
3. UNRECORDED CONVEYANCES—JUDGMENT LIEN—EQUITABLE TITLES.—Section 271, Hill's Code, which provides that a conveyance of real estate, or any interest therein, shall, as against the lien of a judgment, be void unless recorded, applies to conveyances which, if recorded, would give notice, but does not apply to the equities of plaintiffs, which require the aid of a court to establish.—*Id.*

See APPEALS, 3; EQUITY, 4; JURISDICTION, 1, 2; PLEADING AND PRACTICE, 2, 6.

JUDICIAL SALES.

CAVEAT EMTOR—ESTOPPEL.—All judicial sales in this state are subject to the doctrine of *caveat emptor*, and do not operate as estoppels in favor of a purchaser and against one having an adverse interest in the land sold, unless the latter, to induce the purchaser to buy, made some representation against such interest upon which the purchaser had a right to, and did rely.—*House v. Fowle*, 303.

JURISDICTION.

1. JUDGMENTS AND DECREES—COLLATERAL ATTACK.—The judgment or decree of a court having jurisdiction to pronounce the same is in respect to the matter directly determined, or actually and necessarily

JURISDICTION—CONCLUDED.

included therein, conclusive upon the parties and those asserting subsequent claims under them, and cannot be collaterally attacked.—*Finley v. Houser*, 562.

2. **PARTIES AND SUBJECT MATTER—VALIDITY OF DECREE.**—A judgment, or decree, rendered by a court having jurisdiction of the parties and of the subject matter, although erroneous, is not void, but, at best, is only voidable; and is conclusive on the parties until reversed by some direct proceeding.—*Crabill v. Crabill*, 588.

See EQUITY, 3; ROADS AND HIGHWAYS, 4.

JURIES.

1. **TRIAL BY JURY—ASSESSMENT OF DAMAGES.**—At common law, in actions of tort, where the defendant suffered a default, the assessment of damages by a jury was not a matter of right, but could be made by the court alone; hence, the provisions of subdivision 2, section 249, Hill's Code, (edition 1892,) requiring the court to assess the damages in such cases without the intervention of a jury, are not in conflict with the guaranty of the constitution of Oregon, that in civil cases the right of trial by jury shall remain inviolate.—*Deane v. Willamette Bridge Co.* 167.
2. **JURY TRIAL—INSTRUCTIONS—EXCEPTIONS.**—(a) A general exception to a charge as a whole cannot be sustained when any part thereof is sound; (b) to maintain an exception to a refusal to charge an entire series of propositions, each one of them must be sound; and (c) an exception cannot be sustained to portions of a charge variant from requests made by a party unless the variance be pointed out.—*Salomon v. Cress*, 177.
3. **INSTRUCTIONS—ASSUMPTIONS OF FACT.**—An instruction which assumes any controverted allegation to be proven, is erroneous as invading the province of the jury.—*Id.*
4. **JURY TRIAL—INSTRUCTIONS—ABSTRACT PROPOSITIONS OF LAW.**—It is erroneous to instruct the jury on abstract propositions of law however correct they may be in theory.—*Bowen v. Clarke*, 566.
5. **JURY TRIALS—UNDISPUTED EVIDENCE—DIRECTING VERDICT.**—When there is no conflict in the evidence, the issue between the parties is one of law, to be determined by the court; and in such cases it is proper for the court to direct the jury to return a certain verdict to conform to the facts.—*Coffin v. Hutchinson*, 554. /

See APPEALS, 2.

LANDS.

1. **RAILROAD LANDS—GRANT IN PRESENTI—ACT OF CONGRESS.**—The grant of lands to the Northern Pacific Railroad Company, by the third section of the act of congress of July 2, 1864, incorporating that company, is a grant *in presenti*, in the nature of a float, until the route was determined according to the requirements of the act; and after that, definite in its nature, attaching to specific sections capable of identification, except as to sections which were expressly reserved.—*Stewart v. Allstock*, 182.

LANDS—CONCLUDED.

2. **PUBLIC LANDS—PRIVATE ENTRY.**—Public lands, within the meaning of the acts of congress, are such as are subject to sale or other disposal under general laws, and do not include those previously granted or in process of private entry by pre-emption, homestead, or the like.—*Id.*
3. **VOID PATENT—REMEDY AT LAW—PLEADING.**—A patent issued for lands not granted, or that were excepted out of the grant under which the patent issued, passes no title, is void, and may be attacked in an action at law by a defendant against whom it is used, if he be a party derailing from the general government a valid paramount title to land included in the patent and the subject of the action; but the pleading of such a party must affirmatively allege the ultimate facts showing him to be in a position to make such attack.—*Id.*

See **TIDE LANDS**, 1, 2, 3.

LANDLORD AND TENANT.

ABANDONMENT OF PREMISES—NEW TENANT—MEASURE OF DAMAGES.—When a tenant wrongfully abandons leased property, the landlord may re-enter the premises for the purpose of caring for the same without waiving his rights under the lease; and he is not bound to find a new tenant for the property; but if he does rent the same to a new tenant, his measure of damages for a breach of the old lease is the difference between the rent under the old lease and the less amount he receives under the new one.—*Bowen v. Clarke*, 566.

LEGISLATURE. See **CONSTITUTIONAL LAW**, 1, 4, 5, 10, 12; **OFFICE**, 1.

LIBEL.

1. **DEFINITION.**—Libel may be defined to be a malicious publication in writing, signs, or pictures, imputing to another something which tends to injure his reputation, to disgrace or degrade him in society, and to lower him in the esteem and opinion of the world, or to bring him into public hatred, contempt, or ridicule.—*Cole v. Neustadter*, 191.
2. **PLEADING—LIBEL—INNUENDO.**—An innuendo serves to explain precedent matter, but never to establish a new charge or enlarge or change the sense of previous words.—*Id.*

LIENS. See **EQUITY**, 4; **JUDGMENTS**, 2, 3; **VENDOR AND VENDEE**, 3.

MANDAMUS.

SUFFICIENCY OF WRIT—STATE DECISION.—A writ of mandamus must itself state facts sufficient to authorize the court to grant the relief sought, and will not be aided by reference to the petition. *McLeod v. Scott*, 21 Or. 94, followed and approved.—*Elliott v. Oliver*, 44.

MASTER AND SERVANT.

1. **NEGLIGENCE—PRESUMPTION—FAILURE OF PROOF.**—In an action against a master by a servant to recover damages for injuries sustained on account of defective machinery, it is presumed that the master has discharged his duty to the servant by providing suitable appliances for the

MASTER AND SERVANT—CONCLUDED.

use of the servant in the employment and in keeping them in proper condition; and this presumption can be overcome only by affirmative proof, either direct or circumstantial, of negligence on the part of the master. Negligence cannot be inferred from the mere happening of an accident; and if the circumstances relied upon to show negligence are consistent with ordinary care on the part of the master, the charge of negligence will fail for want of proof.—*Kincaid v. O. S. L. etc. Ry. Co.* 33.

2. **MASTER AND SERVANT—VICE-PRINCIPAL—FELLOW-SERVANT—NEGLIGENCE.**—An employe engaged in the performance of some duty which the master owes to the servant,—such as that of a railroad company to furnish a reasonably safe track and roadbed whereon its trainmen may operate its cars,—is a vice-principal as distinguished from a fellow-servant; and his negligence causing injury to such servant will render the master liable.—*Fisher v. O. S. L. etc. Ry. Co.* 533.

MORTGAGES.

FORECLOSURE—REDEMPTION OF PARCEL.—A mortgage was foreclosed and the whole mortgaged premises sold on execution to the mortgagee without making a defendant of one who owned part of the land by title acquired subject to the mortgage; held, in a suit by the successor in interest of such owner to redeem his parcel of land, that the mortgagee must elect between redemption of the whole premises on the one hand, or, on the other, conveyance of the parcel to the plaintiff, in the suit to redeem.—*Wilson v. Tarter*, 504.

See EQUITY, 5, 6, 7; EXECUTORS AND ADMINISTRATORS, 3; JUDGMENTS, 2; SUBROGATION, 1.

MUNICIPAL CORPORATIONS.

1. **OFFICERS AND AGENTS—EXCESS OF AUTHORITY—RATIFICATION.**—A municipal corporation, like a private person, is liable for services performed for it under direction of its officers or agents, but in excess of their authority, provided it ratifies and accepts the same after they are brought to its official knowledge through proper channels; but mere silence or acquiescence will not amount to ratification; there must be some affirmative action in that respect, or action from which ratification would be necessarily inferred.—*Murphy v. Albina*, 106.
2. **COMMON COUNCIL—OFFICIAL MEETINGS.**—Where the liability of a municipal corporation depends on the action of its common council, such action, to be binding, must be had by ordinance, resolution, or other equivalent proceeding at a meeting of such body regularly convened, and cannot be based on acts of individual members of the council not at an official meeting.—*Id.*

MURDER. See CRIMINAL LAW, 5.

MUTUAL BENEFIT SOCIETIES.

1. **NEW LEGISLATION—EXERCISE OF POWERS.**—The right of mutual benefit societies to alter, amend, or repeal their laws, or to enact others consistent with the purpose for which they are organized, is well recog-

MUTUAL BENEFIT SOCIETIES—CONCLUDED.

nized; but this right must not be so exercised as to operate as a repudiation of their obligations, or to work a forfeiture of rights previously vested in their members.—*Wist v. A. O. U. W.* 271.

- 2 **RETROACTIVE LAWS—IMPOSSIBILITY OF COMPLIANCE.**—New legislation of mutual benefit societies will not be construed as retroactive if such a result can be avoided; but even if such construction be inevitable, the law will not be allowed to apply to a case where, without any fault of his own, it is impossible for a member to comply with its requirements.—*Id.*

NEGLIGENCE.

1. **INJURY—CONTROL OF LOCUS IN QUO—SUBSEQUENT REPAIR.**—While evidence of additional precautions or subsequent repair is not competent for the purpose of proving antecedent negligence, it is competent for the purpose of showing that the place where the injury occurred was under the control of the defendant, and he may require the court to restrict such evidence to its legitimate effect by a proper instruction.—*Skottowe v. O. S. L. etc. Ry. Co.* 430.
2. **COMMON CARRIERS—DEPOTS—APPROACHES.**—A corporation performing the duties of a public carrier, is bound to keep its depots, or landing places, and the grounds around them, owned by such corporation, or in its possession, and used in connection therewith, safe and convenient for all persons who have lawful occasion to use them; and it is bound to keep all approaches thereto constructed by it and under its control for the use of persons having lawful occasion to use them, safe and convenient for such use, even though the same be within the limits of the highway or a street.—*Id.*
3. **ORDINARY CARE—DANGEROUS PLACE—CONTRIBUTORY NEGLIGENCE.**—A public carrier is only bound to use ordinary care in view of the dangers to be apprehended; it is not bound to keep its premises absolutely safe, nor is it liable for accidents due to a want of ordinary care on the part of the injured person.—*Id.*

See **FRAUD, 3; MASTER AND SERVANT, 1, 2.**

NOTICE.

1. **POSSESSION OF LAND—NOTICE TO SUBSEQUENT PURCHASERS.**—A person taking a conveyance of, or incumbrance upon, land when another is in the actual and visible possession thereof, will be affected with notice of everything in relation to the title which could be known on diligent inquiry; and where a party has notice of such facts as should put a prudent man on inquiry, a failure to make such inquiry is visited with all the consequences of actual notice. *Wood v. Rayburn*, 18 Or. 1, followed and approved.—*Rayburn v. Davison*, 242.
2. **TRUSTS—NOTICE TO PURCHASER.**—A party who, having knowledge of facts and circumstances which impress a trust on land, whether express or implied, acquires title thereto, takes the same charged with the trust,

NOTICE—CONCLUDED.

and stands in no better position than a party to the trust.—*Manaudas v. Mann*, 525.

See **PRINCIPAL AND AGENT**, 2.

OFFICE.

MEMBER OF LEGISLATURE—OFFICE CREATED BY LEGISLATIVE ASSEMBLY—

ELIGIBILITY.—A person who was a member of the legislative assembly which passed the "Meussdorffer Act," is not thereby disqualified to serve, during the term for which he was elected, as a member of the bridge committee created by the act, because such a position is not an office.—*State ex rel. v. George*, 142.

See **CONSTITUTIONAL LAW**, 1, 2.

PARTITION. See CONFUSION OF GOODS, 1.

PARTNERSHIP.

1. **INCORPORATORS—PARTNERS—ASSUMING CORPORATE NAME.**—Where three or more persons execute and file articles of incorporation under the laws of this state, and do nothing further toward effecting an organization or carrying on the proposed business, they do not thereby become liable as partners, although one of them assumes to do business under the proposed corporate name and incurs liabilities in that name.—*Rutherford v. Hill*, 218.

2. **PARTNERS—JOINT DEBTORS—STATUTE OF LIMITATIONS.**—It is a general rule that a joint debtor may, as soon as he has paid more than his share of any single joint debt, enforce contribution from his fellow-debtor as to that debt; but as between partners, this principle does not apply, the rule in such case being, that no cause of suit or action arises in favor of one against the other for contribution, and that the statute of limitations does not begin to run, until the partnership business is fully settled and a balance in favor of one or the other ascertained, notwithstanding the partnership itself may have been previously dissolved.—*McDonald v. Holmes*, 212.

3. **PAST SERVICE FOR FIRM—ADDITIONAL COMPENSATION.**—After a service is rendered for a firm, the compensation for which is fixed by contract, it is not competent for one member of the firm, without the consent of the other, to subject the firm to liability for additional compensation for the service already rendered.—*Conn v. Conn*, 452.

PLEADING AND PRACTICE.

1. **PLEADINGS—AMENDMENTS—DISCRETION OF COURT.**—The allowance of amendments to pleadings and the terms thereof are wholly within the discretion of the trial courts; and their decisions on those questions will not be reviewed in this court except for an abuse of discretion to which an exception has been properly taken.—*Wallace v. Baisley*, 572.

2. **COMPLAINT AND ANSWER—IMMATERIAL ISSUE—JUDGMENT ON PLEADINGS.**—Where the only issue in a case is raised by a denial, in the XXII Or.—42.

PLEADING AND PRACTICE—CONTINUED.

answer, of immaterial allegations in the complaint, without which a complete cause of action would remain, the plaintiff is entitled to a judgment on the pleadings, as a legal right which the court cannot refuse.—*Id.*

3. **DISPUTED BOUNDARY—LEGAL TITLE—STARE DECISIS.**—Where, in a suit under the statute, it appears from the pleadings and evidence that the only controversy between the parties is the legal title to a strip of land claimed to have been acquired by adverse possession, the complaint will be dismissed, and the parties required to try the legal title at law. *Love v. Merrill*, 19 Or. 545, followed and approved.—*Dice v. McCauley*, 458.
4. **PRACTICE—FINDINGS OF FACT—LEGAL CONCLUSIONS.**—Findings of fact which merely announce certain legal conclusions deducible from facts not stated, are not sufficient to support a judgment.—*Kane v. Rippey*, 299.
5. **INSURANCE—SPECIFIC PERFORMANCE—RENEWAL OF POLICY—FAILURE OF PROOF.**—A complaint which seeks to enforce specific performance of a parol agreement for the delivery of a new policy of insurance, to ascertain the plaintiff's loss thereunder, and decree a recovery of the amount thereof, is not supported by testimony tending to show a renewal of a former policy.—*Dodd v. Home Mutual Ins. Co.* 3.
6. **JOINT ACTION—SEVERAL JUDGMENT.**—Where a plaintiff proceeds against several defendants jointly, he may dismiss the action as to some of them, and prosecute it to final judgment against the others, in any case where a separate action might have been maintained.—*Hamm v. Basche*, 513.
7. **PRACTICE IN SUPREME COURT—APPEALS—BILL OF EXCEPTIONS.**—The practice of incorporating in a bill of exceptions all the testimony taken in the court below, whether pertinent to the exceptions or not, is condemned as being contrary to the statute defining what a bill of exceptions should contain.—*Fisher v. O. S. L. etc. Ry. Co.* 583.
8. **PRACTICE IN SUPREME COURT—BILL OF EXCEPTIONS.**—This court will not strike from the files a bill of exceptions containing all the evidence given in the court below, instead of only so much thereof as may be necessary to explain the exceptions, but will decline to examine the questions sought to be presented in that irregular manner.—*Hamilton v. Gordon*, 557.
9. **PRACTICE IN SUPREME COURT—BILLS OF EXCEPTIONS—STATEMENT OF EVIDENCE.**—It is unnecessary to recite in a bill of exceptions more of the testimony than is necessary to explain the objection to be urged on appeal. *State v. Drake*, 11 Or. 396, and *Janeway v. Holston*, 19 Id. 97, followed and approved.—*Piore v. Ladd*, 202.
10. **PRACTICE ON APPEAL—ADDITIONAL FINDINGS OF FACT.**—Unless it appear by the bill of exceptions that application was made to the court below for different or additional findings, and refused, any complaint in the supreme court in regard to findings of fact appearing in the record, presents no question for review on appeal.—*Umatilla Irrigation Co. v. Barnhart*, 389.

PLEADING AND PRACTICE—CONCLUDED.

11. PRACTICE ON APPEAL—DEFECTIVE DENIALS—WAIVER OF OBJECTION.—Where the evidence has all been taken, and the case has, without objection, been heard to a final decree on an issue that is defective by reason of argumentative denials in the answer, neither party will be heard to complain of the error for the first time in the supreme court.—*Rayburn v. Davisson*, 242.
12. NONSUIT—PRACTICE ON APPEAL.—The ruffing of the court below denying a motion for nonsuit, will not be considered on appeal unless the bill of exceptions shows affirmatively that it contains all the evidence given on behalf of plaintiff at the trial.—*Coffin v. Hutchinson*, 554.
13. PRACTICE—NONSUIT—CASE IN JUDGMENT.—It appearing from an examination of the record in this case, that there was some evidence on the part of the plaintiff, however slight, to sustain the verdict, *held*, that it was not error in the court below to deny the motion of defendant for a nonsuit.—*Kyberg v. Portland Cable Ry. Co.* 224.
14. PRACTICE—NONSUIT—EVIDENCE.—In considering a motion for nonsuit, the court will not examine the weight of the evidence offered by the plaintiff; but if there be any evidence which the jury might believe, and upon which a verdict might be based, the motion will be denied.—*Salomon v. Cress*, 177.
15. RELEASE—PLEADING—EVIDENCE—VERDICT.—A release, like every other contract, must be supported by a consideration; but where the release and the consideration are sufficiently pleaded, and there is some evidence tending to support the allegation, the verdict of a jury thereon will not be disturbed on appeal.—*Rawson v. Stewart*, 256.

See ACCOUNT STATED, 1; LANDS, 3; LIBEL, 2; MANDAMUS, 1.

POSSESSION. See EJECTMENT, 1; NOTICE, 1.

PRINCIPAL AND AGENT.

1. AUTHORITY OF AGENT.—Before parties can be bound by the acts or declarations of one professing to be their agent, his authority as such agent must be shown.—*O. R. & N. Co. v. Swinburne*, 574.
2. NOTICE TO AGENT.—If information received by an agent, acting within the scope of his authority, be of a character which makes it his duty to communicate the same to his principal, the latter is bound by the notice arising from the information, although it was not received by the agent in the identical transaction to which the notice relates.—*Rayburn v. Davisson*, 242.

See MUNICIPAL CORPORATIONS, 1.

RAILROADS. See CARRIERS, 1; CONSTITUTIONAL LAW, 9; CONTRACTS 1 NEGLIGENCE, 2, 3.

REPLEVIN. See EVIDENCE, 3; SHERIFFS, 1, 2; VENDOR AND VENDEE,

ROADS AND HIGHWAYS.

1. **ROADS AND STREETS—EASEMENTS AND SERVITUDES.**—By the location of a county road, the public only acquires an easement in the land, while the fee remains in the owner, subject to this charge of the public thereon; and when the road is vacated by public authority, the land covered by it immediately reverts to the owner freed from the easement.—*Leakin v. Terwilliger*, 97.
2. **COMMON LAW—COUNTIES—DEFECTS IN HIGHWAY.**—At common law, a county was not liable for an injury resulting from a defect in one of its highways, or roads.—*Templeton v. Linn County*, 313.
Per LORD, J., dissenting:
3. **COUNTIES—IMPLIED LIABILITY COMMON LAW REMEDY.**—When the legislature by statutory provision organizes a county into a body politic and corporate, with power to contract and be contracted with, to sue and be sued, and devolves on it the duty to keep in repair the highways within its jurisdiction, and provides it with the means of enforcing the performance of this duty, a liability against the county, for which the common law will furnish a remedy whether one is expressly provided by statute or not.—*Id.*
4. **COUNTY ROADS—JURISDICTION—RECITALS IN RECORD.**—On a petition to vacate a county road, where the journal entry of the county court recited facts showing legal notice of the intended application, "and that these facts were made to appear satisfactorily to the court," jurisdiction will be presumed to have been acquired, though the affidavit of posting notices was ambiguous in its statement of facts.—*Latimer v. Tillamook County*, 291.
5. **IDEM—REPORT OF VIEWERS—REMONSTRANCE.**—Under Hill's Code, § 4065, which provides for locating and altering public roads, and directs that, after receiving the report of the viewers, the court shall "cause the same to be publicly read on two different days" before acting on the report, the right to remonstrate continues until after the report is read a second time.—*Id.*
6. **COUNTY ROADS—POSTING COPIES OF NOTICE—CASES LIMITED.**—In proceedings to lay out, alter, or vacate county roads, it is sufficient to post copies instead of originals of the notice of the presentation of the petition. *Minard v. Douglas Co.* 9 Or. 206, and *King v. Benton Co.* 512, limited.—*Vedder v. Marion County*, 284.
7. **IDEM—NOTICES—AFFIDAVIT OF PETITIONER—STARE DECISIS.**—A petitioner is competent to make affidavit of the posting of notices in proceedings to establish or vacate highways. *Gaines v. Linn Co.* 21 Or. 425, followed and approved.—*Id.*
8. **VACATION OF ROAD—SUFFICIENCY OF PETITION—CASE IN JUDGMENT.**—The petition in this cause is examined, and held to sufficiently describe the road sought to be vacated.—*Id.*

See CONTRACTS, 2.

SALES. See **CONTRACTS**, 4, 5, 6; **JUDICIAL SALES**, 1; **VENDOR AND VENDEE**, 1, 2, 3.

SHERIFFS.

1. **CONVERSION OF PROPERTY—EXECUTION—JUSTIFICATION OF SHERIFF—DEFENDANT IN WRIT.**—In an action for the conversion of personal property, when the defendant attempts to justify as a sheriff levying on the property as that of a third party, his answer, to be sufficient, must allege that the property taken belonged to the defendant in the execution.—*Howard v. Oonds*, 581.
2. **VERDICT OF SHERIFF'S JURY—INDEMNIFYING BOND—CUMULATIVE REMEDY.**—The remedy of the claimant of personal property, on a bond indemnifying a sheriff for selling the property on execution notwithstanding the verdict of a sheriff's jury, is cumulative, and does not take away the claimant's right of action for the wrongful seizure of his property.—*Id.*

STATUTES. See **CONSTITUTIONAL LAW**, *passim*.

STATUTE OF LIMITATIONS.

1. **EQUITY—CLOUD ON TITLE—STATUTE OF LIMITATIONS.**—A suit by the owner in fee to determine an adverse claim to, or interest in, real property, or to remove a cloud from the title thereof, cannot be barred by the statute of limitations while the adverse claim or cloud exists, because the right to have the same removed is a continuing right.—*Meier v. Kelly*, 136.
2. **TRUSTEE AND CESTUI QUE TRUST.**—As between trustee and *cestui que trust*, in the case of express trust, where the latter seeks relief against the former, the statute of limitations has no application, because, among other reasons, the law will not permit the trustee to begin to hold adversely until he shall have first restored the property to the real owner, and given notice of his own interest.—*Manaudas v. Mann*, 625.

See **PARTNERSHIP**, 2.

SUBROGATION.

SATISFACTION OF MORTGAGE—DOWER ESTATE—ADMINISTRATOR'S SALE—CASE IN JUDGMENT.—The facts in this case are examined, and it is held, that the defendant having purchased the land in question at an administrator's sale, and the money paid by him having been applied to the satisfaction of a mortgage on the land in which the plaintiff's dower, together with the fee, was charged as security for the payment of her deceased husband's debt, the defendant should be subrogated to the rights of the mortgage, as against the dower estate.—*House v. Fowler*, 303.

SURETY. See **CONTRACTS**, 3.

TAXATION.

STATE BOARD OF EQUALIZATION—CLASSIFICATION OF REAL PROPERTY.—Under the law of this state, there are, for the purposes of assessment and taxation, but three kinds of real property; by this classification

TAXATION—CONCLUDED.

the state board of equalization is bound, and cannot, either on the basis of present ownership, source of title, or otherwise, change the same so as to add new kinds or increase the assessments of individuals or classes of people holding lands of the kinds thus invented.—*O. & C. R. R. Co. v. Croisan*, 393.

TIDE LANDS.

1. TITLE OF STATE—POWER OF SALE—RIGHTS OF NAVIGATION.—When the state of Oregon was admitted into the union, the title to the tide lands within its boundaries vested in the state, which might, by virtue thereof, sell or otherwise dispose of all the lands between high and low tide, in fee simple, subject only to the paramount rights of navigation and commerce over the waters.—*Bowlby v. Shively*, 410.
2. GRANT OF GENERAL GOVERNMENT—UPLAND OWNER—HIGH TIDE MARK.—By a grant from the general government, an upland owner of real property abutting upon tide-water takes title only to high tide mark.—*Id.*
3. TITLE OF STATE—STARE DECISIS.—On the authority of *Bowlby v. Shively*, ante, 410, it is held, that the title to the tide lands in the state vested in the state when it was admitted into the union.—*Hogg v. Davis*, 423.

TRUSTS. See NOTICE, 2.

VENDOR AND VENDEE.

1. CONTRACT FOR SALE OF CHATTELS.—Where, by the terms of an agreement for the sale of chattels, the vendor is to do anything with the property for the purpose of putting it into the condition in which the vendee is bound to accept it, or anything remains to be done to ascertain the quantity, where the goods are sold by weight or measure, the performance of these things, in the absence of circumstances showing a contrary intention, is a condition precedent to vesting the title in the vendee.—*Hamilton v. Jordan*, 557.
2. IDEM—BREACH OF CONTRACT—DAMAGES—REPLEVIN.—A vendee may recover damages for the breach of a contract for the sale of chattels, in case the vendor violates the contract by delivering only a part of the goods, and refusing to deliver the remainder; but replevin will not lie to recover the undelivered goods.—*Id.*
3. VENDOR'S LIEN—SUBSEQUENT INCUMBRANCES—NOTICE.—Whether vendors' liens exist in this state or not, they cannot affect subsequent claimants or incumbrancers of the property who have no notice of the lien.—*Lewis v. Henderson*, 548.

See CONTRACTS, 4, 5, 6.

WEAPON. See CRIMINAL LAW, 5

WILLS.

1. CONSTRUCTION—CUMULATIVE LEGACIES—DISTRIBUTION.—A testator, by one clause of his will, directed the sale of certain realty, one half of the proceeds thereof to be turned over to H., as trustee, and the income

WILLS—CONTINUED.

thereof to be paid every three months to plaintiff during her lifetime, and made final disposition of the fund after plaintiff's death. By another clause, he bequeathed to H., as trustee, ten thousand dollars, the income thereof to be paid at the end of every three months to plaintiff, she to receive the sum of three hundred and seventy-five dollars per quarter therefrom. If the income derived from said ten thousand dollars does not reach three hundred and seventy-five dollars per quarter, then the deficiency is to be paid out of the residuary estate; *held*, that these are cumulative legacies, and that the deficiency in the income provided for in one clause, if any such deficiency shall arise, must be paid out of the residuary estate, and not out of the property named in the other clause.—*Morse v. Macrum*, 229.

2. ANNUITIES—DEFICIENCY IN LEGACIES—RESIDUARY ESTATE—FINAL SETTLEMENT.—A probable deficiency in an annuity provided for by a will being variable and undetermined in amount, there can be no final settlement of the estate until the death of the annuitant, where the will requires the deficiency to be made up from the residuary estate.—*Id.*
3. WILLS, WHEN TO TAKE EFFECT.—A will speaks from the death of the testator, and not from its date, unless its language, by a fair construction, indicate a contrary effect.—*Id.*

ON REHEARING.—

4. The provisions of the will in question having been re-examined, it is *held* that the residuary estate mentioned in the twenty-third clause is not subject to further charge in making up deficiencies in annuities, and that final settlement of the estate is not to be postponed on account of any such deficiency.—*Id.*
5. DESCENT—HEIRS.—Where a party claims as heir, he must first establish affirmatively his relationship with the deceased; and, second, that no other descendant exists to impede the descent to the plaintiff.—*Franks v. Shipley*, 104.
6. WILLS—TESTAMENTARY CAPACITY—STARE DECISIS.—In respect to testamentary capacity it is sufficient if the testator knew and understood what he was doing, and to whom he was giving his property when he executed his will. *Clark v. Ellis*, 9 Or. 128, and *Chrisman v. Chrisman*, 16 Or. 127, followed and approved.—*Id.*
7. REAL PROPERTY—DESCENTS—HEIRS.—An intestate died seized of real property, and left surviving her her husband and four minor children. Of these children, two minor sons afterwards died childless and unmarried; *held*, that the real property inherited by them from their mother descended to their father, to the exclusion of the other children.—*Stitt v. Bush*, 239.
8. WILLS—TESTAMENTARY CAPACITY.—A testator was paralyzed and unable to make any communication to those about him except by signs; but it appeared that at the time his will was executed, his mental faculties were unimpaired; that he perfectly understood his business affairs

WILLS — CONCLUDED.

and the terms of the will; and that the will correctly represented his wishes as to the disposition of his property; *held*, that he was possessed of sufficient testamentary capacity.— *Rothrock v. Rothrock*, 571.

WITNESSES.

IMPEACHMENT OF WITNESS—WEIGHT OF EVIDENCE.—To show that the reputation of a witness for truth and veracity is bad, does not of itself entirely destroy his testimony where it is intrinsically probable or is corroborated by other evidence. Under such circumstances it must be considered for what it is worth with other evidence; but where it is not supported, it may be utterly disregarded.— *Wimer v. Smith*, 439.

See CRIMINAL LAW, 4; EVIDENCE, 4.

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